

Title: California Dental Association, Petitioner  
v.  
Federal Trade Commission

Docketed:  
April 3, 1998

Court: United States Court of Appeals for  
the Ninth Circuit

Entry Date

Proceedings and Orders

Apr 3 1998 Petition for writ of certiorari filed. (Response due June 3, 1998)  
May 1 1998 Brief amici curiae of American Dental Association, et al. filed.  
May 4 1998 Order extending time to file response to petition until June 3, 1998.  
Jun 1 1998 Brief of respondent Federal Trade Commission in opposition filed.  
Jun 1 1998 Brief of American College for Advancement in Medicine filed.  
Jun 17 1998 DISTRIBUTED. September 28, 1998  
Jul 1 1998 Reply brief of petitioner California Dental Association filed.  
Sep 29 1998 Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. Rule 29.2 does not apply.  
SET FOR ARGUMENT January 13, 1999.  
\*\*\*\*\*  
Nov 10 1998 Brief amicus curiae of American Society of Association Executives filed.  
Nov 10 1998 Brief amicus curiae of National Collegiate Athletic Association filed.  
Nov 10 1998 Joint appendix filed.  
Nov 10 1998 Brief of petitioner California Dental Association filed.  
Nov 10 1998 Brief amicus curiae of American College for Advancement in Medicine filed.  
Nov 10 1998 Brief amici curiae of American Dental Association, et al. filed.  
Nov 23 1998 CIRCULATED.  
Dec 3 1998 Application (A98-455) of the Solicitor General for an extension of time within which to file respondent's brief on the merits, submitted to Justice O'Connor.  
Dec 3 1998 Application (A98-455) granted by Justice O'Connor.  
Dec 8 1998 Brief amicus curiae of Arizona filed.  
Dec 11 1998 Brief of respondent Federal Trade Commission filed.  
Dec 14 1998 Motion of Consumer Dental Choice Project, etc. for leave to file a brief as amicus curiae filed.  
Dec 18 1998 Opposition of California Dental Association to motion of Consumer Dental Choice Project for leave to file a brief as amicus curiae filed.  
Dec 29 1998 Reply brief of petitioner California Dental Association

JRP

Entry Date

Proceedings and Orders

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	filed.
Jan 6 1999	Record filed.
Jan 6 1999	Record filed.
Jan 11 1999	Motion of Consumer Dental Choice Project, etc. for leave to file a brief as amicus curiae GRANTED.
Jan 13 1999	ARGUED.

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~~RECEIVED  
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APR 3 1998~~

IN THE

**Supreme Court of the United States**  
OCTOBER TERM 1997

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CALIFORNIA DENTAL ASSOCIATION,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The Federal Trade Commission (the “Commission”) issued an administrative complaint alleging that the California Dental Association (“CDA”), a non-profit professional association, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by prohibiting member dentists, through its Code of Ethics, from engaging in false or misleading advertising. Despite the finding by the Administrative Law Judge that CDA’s enforcement of its Code of Ethics “has no negative impact on competition,” the Commission and the Court of Appeals held that CDA violated the antitrust laws. The two basic questions presented by this petition are:

1. Whether the Commission has jurisdiction over nonprofit professional associations.
2. Whether a nonprofit professional association violates the antitrust laws under the rule of reason when its advertising disclosure requirements are animated by procompetitive purposes, do not directly affect price or output, and have no negative impact on competition.

## RULE 29.1 LISTING

The California Dental Association has no parent companies or nonwholly owned subsidiaries.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT**

Petitioner, CDA, respectfully prays that a writ of certiorari issue to review the judgments of the Court of Appeals for the Ninth Circuit entered on October 22, 1997 and January 28, 1998.

**OPINIONS BELOW**

The opinion of the court of appeals is reported at 128 F.3d 720 and is reproduced in the Appendix at 8a. The order denying rehearing is reproduced in the Appendix at 266a. The opinion of the Commission and the initial decision of the Administrative Law Judge ("ALJ") are reproduced in the Appendix at 43a and 159a, respectively.

**JURISDICTION**

The judgment of the court of appeals was entered on October 22, 1997. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1993).

**STATUTORY PROVISIONS**

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . .

Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 44, provides in pertinent part:

The words defined in this section shall have the following meaning when found in this subchapter, to wit:

\* \* \* \*

"Corporation" shall be deemed to include any company . . . or association, which is organized to carry on business for its own profit or that of its members . . . .

Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), provides in pertinent part:

- (1) Unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
- (2) The Commission is hereby empowered and directed to prevent persons, partnerships or corporations . . . from using unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce.

#### STATEMENT OF THE CASE

This case involves a nonprofit professional association charged with restraining trade by enforcing a provision of its code of ethics which bars false and misleading advertising. The case has been controversial from its outset, resulting in differing methods of analysis at each level of adjudication and split decisions by both the Commission and the Ninth Circuit. The Commission majority held that CDA's Code of Ethics violated Section 5 of the FTC Act, 15 U.S.C. § 45, despite the ALJ's finding that

the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has *no impact on competition* in any market in the State of California, *particularly with respect to price and output*.

App. 246a (emphasis added). The panel majority of the Ninth Circuit affirmed the Commission's decision, raising two significant issues of antitrust law: *first*, does the Commission have jurisdiction over CDA as a nonprofit professional association; and *second*, can a prohibition against false

and misleading advertising which has been affirmatively found to have no impact on competition, nonetheless violate the antitrust laws under the rule of reason.

#### 1. Factual Background

##### a. The California Dental Association

CDA is an association of dentists whose principal purposes are to promote high professional standards in the practice of dentistry, encourage the improvement of the health of the public, and advance the art and science of dentistry. CDA is not organized for profit, has no shares of stock or certificates of interest, and no portion of its net earnings inures to the benefit of any member or individual. The dues revenue received by CDA is not distributed to its officers, members or directors. Rather, CDA's funds are used to implement the objectives and goals of the association as specified by its Bylaws and Articles of Incorporation. App. 161a-62a; RX 117-D; TR 1140-42, 1769-70. CDA is exempt from federal income taxation under IRS Code Section 501(c)(6). App. 174a.

CDA promotes a vast array of educational, scientific, and public health objectives. For example, it develops material for use in community dental health projects such as school screenings, baby bottle tooth decay videos, dental health materials for school age children, and senior abuse/neglect detection. App. 165a; TR 1148-49. CDA provides information to the public regarding scientific aspects of dental treatment and procedures, and up-to-date data on public health issues such as AIDS, transmission of infectious diseases, infection control techniques and hazardous substances. App. 164a; TR 1154. CDA is also a leading force in continuing dental education. TR 1150, 1161-62.

CDA promotes public health even when doing so is contrary to the economic interests of its members. It led the fight for fluoridation in California, perhaps the most cost-

effective dental health initiative enacted, despite the fact that fluoridation reduces the need for dental care. App. 188a-89a; TR 814-15, 1300-01.

CDA also provides certain ancillary services to its members such as lobbying concerning dental issues, marketing, public relations and practice management seminars, assistance in compliance with OSHA and other laws and regulations, and administrative procedures for resolving patient complaints. App. 164a-65a, 181a-82a. In addition, CDA operates several ancillary for-profit subsidiaries through which members can obtain liability and other types of insurance, financing for equipment purchases and home mortgages, and auto leasing. App. 165a-70a.

While approximately 75% of the practicing dentists in California are members of CDA, membership is entirely voluntary and is not a prerequisite to licensure or the successful practice of dentistry. More than 5,500 dentists who actively practice dentistry in California do not belong to CDA. App. 144a, 161a-62a, 245a; TR 733-34, 833, 1639.

#### **b. CDA's Ethical Standards**

To promote public confidence in the practice of dentistry, CDA has promulgated a Code of Ethics. The Commission's complaint focuses on the provisions of the Code that prohibit false and misleading advertising. These provisions substantially mirror California state law. App. 190a-91a; RX-64-A; RX 136 A-E; TR 1085-87. Section 10 of the Code sets forth CDA's basic ethical standard:

Although any dentist may advertise, no dentist shall advertise or solicit patients . . . in a manner that is false or misleading in any material respect.

App. 190a. CDA relies on the California Dental Practice Act to define what is false and misleading. App. 218a.

The Commission's complaint centers on the application of Section 10 to discount and quality advertising. The Code of Ethics does not prohibit either type of advertising. Rather, the Code requires such ads to disclose specified facts to insure that consumers are not misled. Advertisements regarding a discounted fee are required to disclose the amount of the non-discounted fee, the amount or percentage of the discount, the length of time the discount will be available, and an identification of those who qualify for the discount. App. 200a. With respect to advertisements regarding quality, the Code requires member dentists to refrain from using subjective and ambiguous phrases that are not susceptible to measurement or verification and are therefore more likely to deceive or mislead the public. App. 202a-04a, 216a-18a.

The maximum sanction that CDA can impose on a member who violates the Code of Ethics is exclusion from CDA. CDA has no power or ability to impede a member's practice of dentistry. CDA has no control over whether a dentist chooses to join CDA, and CDA cannot impose its ethical principles on dentists who have no connection with CDA. App. 144a; TR 1170-71, 1352-54, 1640-41.

#### **2. Proceedings Below**

##### **a. The Administrative Hearing**

The Commission asserted jurisdiction over CDA under Section 4 of the FTC Act, claiming that CDA is "organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. On the substantive antitrust issues, the Commission presented *no evidence*, even in the form of expert testimony, regarding the competitive effect of CDA's challenged practices. App. 110a.

The ALJ found that the Commission had jurisdiction over CDA because a "substantial" portion of CDA's activities "engender a pecuniary benefit to its members." App.

253a. On the competitive effect of CDA's Code of Ethics, the ALJ made several critical findings, including:

1. "complaint counsel have not produced any convincing evidence that CDA members have acted or could act together to raise prices or reduce output, nor have they established in what geographic market or markets the alleged market power could be exercised." App. 262a.
2. "the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has no impact on competition in any market in the State of California, particularly with respect to price and output." App. 246a.
3. "CDA's enforcement of its Code of Ethics with respect to advertising has no negative impact on competition in any dental market in California because it cannot erect any barriers to entry . . . into any dental market in California." App. 245a.
4. "The oversupply of dentists . . . [is] strong evidence of low entry barriers." *Id.*
5. "CDA membership is not a prerequisite to successful practice in any California Dental Market." *Id.*
6. "CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local." App. 262a.
7. "CDA has a legitimate interest in fostering truthful, informative advertising by its members . . ." App. 258a.
8. "Professor Knox [the only economist to testify] testified that scrutiny of dental advertising is pro-competitive because advertising which is false and mis-

leading has a negative impact on competition." App. 245a-46a.

In light of these findings, the ALJ held that the Commission failed to establish a Section 5 violation under traditional rule of reason analysis. App. 262a. Nevertheless, the ALJ found that this failure was "not fatal." *Id.* Instead, he applied the Commission's analytical approach announced in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988) ("Mass. Board"), and concluded that CDA's Code of Ethics is "inherently suspect" and can be "quickly condemned" as an unreasonable restraint of trade without a detailed market analysis. App. 257a, 259a, 262a. The ALJ faulted enforcement of the Code as overbroad because it barred "inexact" and incomplete advertisements. App. 260a.

#### **b. The Commission Decisions**

The Commission, by a vote of 4 to 1, affirmed the ALJ's finding of a violation, but disagreed with the ALJ's analytical approach. App. 45a. On the jurisdictional issue, the Commission ruled that CDA comes within Section 4 of the FTC Act because "CDA confers pecuniary benefits upon its members as a substantial part of its activities." App. 51a. With respect to the competitive effect of CDA's Code of Ethics, the Commission majority declared that it would not follow its own *Mass. Board* decision. Instead, the majority determined that CDA's disclosure requirements for discount advertising constituted a *per se* violation of the antitrust laws, even though the Code concededly "differ[s] from the classic price fixing conspiracy." App. 63a. Alternatively, the Commission majority applied the "quick look" rule of reason approach to the Code's treatment of discount advertising and to claims of superiority. By its own admission, the majority's application of the rule of reason was "simple and short," involving no substantial analysis of market definition, market power or competitive effects or any attempt to quan-

tify any increase in price or reduction in output. *Id.* at 74a, 78a.

The majority's reliance on the *per se* rule and its cursory rule of reason analysis brought a thorough and strongly worded dissent from Commissioner Azcuenaga.<sup>1</sup> She described the majority's approach as "chimerical" and unable to "withstand the hard light of day." *Id.* at 108a. The focus of Commissioner Azcuenaga's dissent was the "weakness of the majority's anticompetitive effects story." *Id.* at 146a. She noted that at trial, the Commission "did not offer evidence, even in the form of testimony of an expert economist, on fundamental elements of a rule of reason analysis." *Id.* at 110a. She found "startling" the majority's "failure to identify a geographic market before finding liability" and its "treatment of the entry issue." *Id.* at 147a. Commissioner Azcuenaga concluded: "No anticompetitive effects having been shown, the complaint should be dismissed . . ." *Id.* at 110a.

#### c. The Court of Appeals Decisions

The Court of Appeals for the Ninth Circuit had jurisdiction over CDA's Petition for Review pursuant to 15 U.S.C. § 45(c). By a 2 to 1 vote, the Court of Appeals affirmed the Commission's finding of a violation, but disagreed in part with the Commission's approach. On the jurisdictional issue, the Ninth Circuit acknowledged a split among the circuits. The majority disagreed with the Eighth Circuit, and sided with the Second Circuit, in holding that the FTC Act confers jurisdiction over nonprofit organizations that "provide tangible, pecuniary benefits to" their members. App. at 16a. On whether CDA's Code of Ethics violated the antitrust laws, the majority rejected the Commission's application of the *per se* rule to CDA's disclosure requirements

for discount advertising, but affirmed the Commission's "quick look" rule of reason approach. *Id.* at 17a.

Judge Real dissented from both the majority's holding on jurisdiction and its application of the "quick look" rule of reason. Judge Real stated that CDA, as a nonprofit professional association, does not operate commercially and "ha[s] no place in the commercial world of the F.T.C." *Id.* at 25a. He also noted that CDA's advertising restrictions are not "sufficiently anticompetitive on their face to eschew a full-blown rule of reason inquiry." *Id.* Judge Real criticized the majority for finding "a restraint on competition without the supporting help from any of the economic principles to be applied to a full market power analysis." *Id.* at 26a.

### REASONS FOR GRANTING THE WRIT

#### I. WHETHER THE COMMISSION HAS JURISDICTION OVER NONPROFIT, PROFESSIONAL ASSOCIATIONS IS AN IMPORTANT QUESTION ON WHICH THERE IS A CONFLICT AMONG THE FEDERAL COURTS OF APPEALS

As the Ninth Circuit acknowledged below, there is an irreconcilable conflict among the courts of appeals as to whether the Commission has jurisdiction over *bona fide* nonprofit professional associations such as CDA. App. 15a. This Court previously granted certiorari to settle this conflict but divided equally and produced no opinion. *American Medical Association v. Federal Trade Commission*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) ("AMA"). Thus, this jurisdictional issue has never been resolved by this Court since the passage of the Act in 1914.

##### A. The Ninth Circuit Expressly Acknowledged A Conflict

The Ninth Circuit applied the test enunciated in the Second Circuit's decision in *AMA*, which admittedly placed it in

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<sup>1</sup> Commissioner Starek also dissented from the majority's *per se* analysis. App 148a.

direct conflict with the Eighth Circuit's decision in *Community Blood Bank of Kansas City Area, Inc. v. Federal Trade Commission*, 405 F.2d 1011 (8th Cir. 1969). App. 15a-16a. Unlike the Sherman Act, the FTC Act does not apply to all entities. Instead, Section 5(a)(2) of the FTC Act expressly limits the Commission's jurisdiction to "persons, partnerships, or corporations." 15 U.S.C. § 45(a)(2). Section 4 defines "corporations" to include only "any company . . . which is organized to carry on business for its own profit or that of its members . . . . *Id.* at § 44. In *AMA*, the Second Circuit held that Section 4 includes nonprofit associations; in *Community Blood Bank*, the Eighth Circuit held that Section 4 does not.

Since *AMA*, the Commission has made regulation of nonprofit associations a top priority.<sup>2</sup> The Commission's continuing campaign to litigate the self-regulatory efforts of professional societies imposes enormous burdens on these societies, including the diversion of scarce resources from their nonprofit and socially desirable objectives. The Court should once again grant certiorari in order to resolve finally

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<sup>2</sup> The following represent consent decrees entered by the Commission against professional associations since 1990. Frequently, these associations do not have the financial resources to endure the time and expense of litigation and thus enter into consent decrees rather than contesting jurisdiction. See, e.g., *La Association Medica de Puerto Rico*, 60 Fed. Reg. 35,907 (July 12, 1995); *American Association of Language Specialists*, 59 Fed. Reg. 48,882 (September 23, 1994); *American Society of Interpreters*, 59 Fed. Reg. 48,882 (September 23, 1994); *McClean County Chiropractic Association*, 59 Fed. Reg. 22,163 (April 29, 1994); *National Society of Professional Engineers*, 58 Fed. Reg. 44,841 (August 25, 1993); *National Association of Social Workers*, 58 Fed. Reg. 17,411 (April 2, 1993); *Association of Engineering Firms Practicing in the Geosciences*, 58 Fed. Reg. 37,483 (April 2, 1993); *United States Golf Association*, 58 Fed. Reg. 5,991 (January 25, 1993); *American Psychological Association*, 57 Fed. Reg. 46,028 (Oct. 6, 1992); *Connecticut Chiropractic Association*, 56 Fed. Reg. 65,093 (December 13, 1991); *Capital Area Pharmaceutical Society*, 114 F.T.C. 159 (1991); *Empire State Pharmaceutical Society, Inc.*, 114 F.T.C. 152 (1991).

the conflict among the circuits regarding the Commission's jurisdiction over nonprofit professional associations.

In deciding what constitutes a corporation organized "for its own profit or that of its members," the *Community Blood Bank* court relied upon several familiar rules of statutory construction: that the Commission has only such jurisdiction as Congress conferred upon it by statute; that when the Commission's jurisdiction is challenged, it has the burden of establishing its jurisdiction; that legislative intent should be ascertained from the language of the statute itself when it is clear and plain; that the plain, obvious, rational meaning of the statute is to be preferred to any curious, narrow, hidden sense; and that common words are to be taken in their ordinary significance in the absence of any evidence of a contrary intent. 405 F.2d at 1015. Where, as here, the language of a statute is clear and unambiguous, review of the statute's legislative history is unnecessary. See, e.g., *Dunn v. Commodity Futures Trading Commission*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 913, 921 (1997) (Scalia, J., concurring).

In *Community Blood Bank*, the Commission asserted jurisdiction over Community Blood Bank ("CBB"), the Kansas City Hospital Association and individual pathologists. CBB was organized as a nonprofit. The Association was a nonprofit which included as members Blue Cross Service Corporation, a 501(c)(4) corporation, two for-profit corporations, and a number of 501(c)(3) corporations. *Community Blood Bank of the Kansas City Area, Inc.*, 70 F.T.C. 728, 755-57 (1966). After a full trial the Hearing Examiner found that the Commission had jurisdiction over the respondents and that respondents had collectively restrained trade by impeding the development of two commercial blood banks. The Commission affirmed this decision. *Id.* at 728.

The Commission's determination of jurisdiction rested on the finding that both the CBB and the Hospital Association conferred pecuniary benefits upon their members in that

"both organizations performed very valuable services" that were "in the broadest sense exceedingly profitable for the doctors and for the hospitals to receive." *Id.* at 767. In addition, the Commission found that the hospital association "is also engaged in business for the benefit or profit of its members when it supplies to them information and other services which they might otherwise have to gather and render themselves." *Id.* at 909-10.

The Eighth Circuit reversed the Commission's decision and held that the CCB and the Association were outside the scope of the Commission's jurisdiction. Although the Association may have provided "valuable services" to its members, the Eighth Circuit recognized that, in light of the language and the legislative history of the FTC Act, the Commission's jurisdiction is limited to entities that are "organized" to conduct "business" for pecuniary "profit" of their members, as those words are commonly understood. *Community Blood Bank*, 405 F.2d at 1017-18, 1020. To help define the word "profit," the court quoted the following language from the Supreme Court of Wisconsin:

[w]hether dividends or other pecuniary benefits are contemplated to be paid to its members is generally the test to be applied to determine whether a given corporation is organized for profit.

*Id.* at 1017 (quoting *Associated Hospital Service, Inc. v. City of Milwaukee*, 109 N.W.2d 271 (Wis. 1961)).

It is clear from *Community Blood Bank* that Congress gave the Commission jurisdiction over corporations "organized" for profit; it did not confer jurisdiction over every corporation that provides "pecuniary" benefits to its members.<sup>3</sup>

<sup>3</sup> Under the standard articulated in *Community Blood Bank*, the Commission is not bound by the mere form of incorporation. The Commission is free to determine whether an entity operates "in law and

Here, rather than apply the *Community Blood Bank* standard, the Ninth Circuit followed *AMA* to find that the Commission had jurisdiction because, although organized and operated as a *bona fide* professional association, CDA's activities purportedly "provide tangible, pecuniary benefits to its members." App 16a.<sup>4</sup> However, this test, applied by the Second Circuit in *AMA* and adopted by the Ninth Circuit, departs from the clear language and meaning of the FTC Act and would extend the scope of the Commission's jurisdiction to cover virtually every nonprofit organization or professional association.

#### B. The Legislative History Supports CDA's Position

The language of the FTC Act is clear that the Commission does not have jurisdiction over nonprofit professional associations. Thus, there is no need to resort to the legislative history. Nevertheless, the legislative history supports CDA's position that nonprofit professional associations are not subject to the reach of the FTC Act. See H.R. Rep. No. 553, 63d Cong., 2d Sess. (1914); S. Rep. No. 597, 63d Cong., 2d Sess. (1914); H.R. Rep. No. 1142, 63d Cong., 2d Sess. (1914). Both the original Senate and House of Representatives versions of the bill to create the Commission were designed specifically to give the Commission jurisdiction

in fact" as a *bona fide* nonprofit corporation. See *Ohio Christian College*, 80 F.T.C. 815 (1972) (asserting jurisdiction over ostensible nonprofit based on finding it was a mere "shell" for an individual entrepreneur "to further his own finance and comfort"). However, where, as here, an association is organized and operated as a genuine nonprofit entity, the Commission's inquiry is at an end and the association is beyond the Commission's jurisdiction.

<sup>4</sup> The Ninth Circuit also cited *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1985). App. 15a. However, in that case, the court upheld the Commission's jurisdiction based on the express finding that the Commission on Egg Nutrition "was organized for the profit of the egg industry." *Egg Nutrition*, 517 F.2d at 488. Here, there is no similar finding in the record.

over purely commercial corporations. *See H.R. Rep. No. 1142, 63d Cong., 2d Sess. 11 (1914); H.R. Rep. No. 1142, 63d Cong., 2d Sess. 14 (1914).*

Moreover, the same Congress that limited the FTC's jurisdiction to for-profit corporations expressly made the Clayton Act, like the Sherman Act before it, applicable to all corporations and associations irrespective of whether they were for-profit or not-for-profit.<sup>5</sup> A comparison of these statutes clearly demonstrates that the FTC Act is not a "carefully studied attempt" to bring within it every entity "whose activities might restrain or monopolize commercial intercourse." *See U.S. v. Southeastern Underwriters Ass'n, 322 U.S. 533, 553 (1944).*

### C. In 1977 Congress Expressly Refused To Expand The Jurisdiction Of The FTC Act

Significantly, Congress rejected the Commission's 1977 request that it amend Section 4 of the FTC Act to extend its jurisdiction to nonprofit organizations, including professional associations. *See Proposed Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. (1977) (hereinafter 1977 Hearings).* As Commission Chairman Collier conceded:

The bill [H.R. 3816] would make several changes in the jurisdiction of the Commission. In particular, it would: (1) Broaden the reach of the FTC Act by redefining 'corporation' to include nonprofit corporations . . . We strongly support each of these changes.

*1977 Hearings* at 69.

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<sup>5</sup> The Clayton Act, like the Sherman Act, applies to all "persons." *See 15 U.S.C. §§ 7, 12.*

Chairman Collier argued that the proposed statutory change was necessary in light of the Eighth Circuit's decision in *Community Blood Bank*:

After *Community Blood Bank*, the Commission's efforts to reach nonprofit corporations engaged in deceptive or anticompetitive practices have succeeded only after the often time-consuming proof that the respondent, whatever its nominal form, was in reality a conduit for essentially commercial interests.

*Id.* at 82. Chairman Collier testified that the Commission encountered such problems when it challenged activities "of nonprofit corporations of a less traditionally commercial character." *Id.* Congress was not persuaded to extend the scope of the FTC Act. The Committee on Interstate and Foreign Commerce of the House of Representatives rejected the proposed provision to broaden the Commission's jurisdiction after hearing testimony noting the absence of jurisdiction under the current wording of Section 4. *H.R. Rep. No. 339, 95th Cong., 1st Sess. 120 (1977).* Thus, by exercising jurisdiction over nonprofit professional associations, the Commission claims authority that Congress refused to extend when it enacted the FTC Act and when it denied the Commission's proposed amendments in 1977.

### D. The Court Should Resolve The Acknowledged Conflict

In the decision below, Judge Real succinctly observed "[t]hese non-profit membership organizations have no place in the commercial world of the F.T.C." App.25a. The position taken by CDA herein is not an argument for an exemption from the antitrust laws. *See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).* The important issue here is: did Congress expressly confer jurisdiction on the Commission over nonprofit professional associations?

There are now four opinions from the federal courts of appeals on the Commission's jurisdiction and there is a direct conflict. The Supreme Court failed to resolve this conflict when it granted certiorari in the *AMA* case. It should grant this Petition now in order to clarify the Commission's jurisdiction.

## II. THE NINTH CIRCUIT'S RULE OF REASON STANDARD IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND AT LEAST TWO OTHER COURTS OF APPEALS

The Ninth Circuit invalidated an ethical code which is facially procompetitive, supported by sound procompetitive justifications, and has been found to have no anticompetitive effects. This perverse result flows from the court's reliance on an abbreviated rule of reason that is in direct and irreconcilable conflict with the decisions of this Court, and the Courts of Appeals for the Third and Seventh Circuits. See *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) ("NCAA"); *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722 (7th Cir. 1986); *Vogel v. American Soc. of Appraisers*, 744 F.2d 598 (7th Cir. 1984). The majority's decision in this case even conflicts with the decision of another panel of the Ninth Circuit. *American Ad Management Inc. v. GTE Corp.*, 92 F.3d 781 (9th Cir. 1996).

The conflict caused by *CDA* goes to the very heart of antitrust enforcement, as it creates confusion regarding the proper rule of reason standard under which the vast majority of conduct is evaluated. Unless this conflict is resolved by the Court, businesses in all industries will be unable to predict what conduct is consistent with antitrust requirements. Some businesses will refrain from procompetitive activity out of fear of antitrust sanctions, including treble damages, and the substantial litigation costs necessary to defend such

claims. Other businesses and associations may be judged to have acted unlawfully even where, as here, the conduct has no anticompetitive effect. In either case, efficiency enhancing practices are deterred and consumer welfare is harmed.

### A. The Full-Scale Rule Of Reason Is The Prevailing Standard

Section 1 of the Sherman Act, and Section 5 of the FTC Act, prohibit only conduct that unreasonably restrains competition. *State Oil Co. v. Khan*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 275, 279 (1997). The "test of legality" is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918). The "rule of reason" is the prevailing standard for evaluating a restraint's impact on competition. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

Under the rule of reason, the party challenging a practice has the burden of showing that the conduct has an anticompetitive effect in a relevant product and geographic market. *Brown*, 5 F.3d at 668. Such an effect can be shown directly, through proof of an increase in price or a reduction in output. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986). If direct evidence is unavailable, competitive injury can be inferred from a showing of market power in a properly defined market, including barriers to entry. *Id.* Market power is the ability to raise price above the level that would prevail in a competitive market. *NCAA*, 468 U.S. at 109 n. 38.

If the party challenging the conduct shows anticompetitive effect, the defendant must show that the conduct promotes a procompetitive goal. The finder of fact balances the anticompetitive effects proved by the plaintiff against the procompetitive benefits shown by the defendant. *American*

*Ad*, 92 F.3d at 791. The rule of reason is violated only if a practice's anticompetitive effects outweigh its procompetitive benefits. *Vogel*, 744 F.2d at 604.

Carefully limited and well identified practices have been determined by this Court to be so pernicious and lacking in procompetitive benefits, that a rule of reason analysis is unnecessary to assess their competitive effect. Such conduct, principally horizontal price fixing, is deemed to be *per se* illegal. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 178 (1965) ("[T]he area of *per se* illegality is carefully limited."); *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958). Because the *per se* rule precludes analysis of competitive impact, it is applied only after "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Khan*, 118 S. Ct. at 279.

In *NCAA*, the Supreme Court used for the first time an abbreviated rule of reason. *NCAA*, 468 U.S. at 109 n.39. As this Court suggested, the "quick look" approach may be used only to condemn practices that are "naked" restraints on price or output for which there are no procompetitive justifications. *Id.* at 109. In the vast majority of cases, a traditional "full-blown" rule of reason analysis is required. See, e.g., *Brown*, 5 F.3d at 678; *American Ad*, 92 F.3d at 789 ("this so-called 'quick look' analysis is the exception, rather than the rule").

Ultimately, whatever test is applied, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA*, 468 U.S. at 103. As is demonstrated by this case, full rule of reason analysis is necessary in most instances to ensure that procompetitive or competitively neutral conduct is not mistakenly condemned. *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 95 F.3d 593, 602 (7th Cir. 1996) (Cudahy, J., concurring). Erroneous, over-inclusive applica-

tion of the antitrust laws results in over-deterrence, which is itself anticompetitive. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235-36 (1st Cir. 1983) (Breyer, J.).

**B. The Ninth Circuit's Use Of The Abbreviated Rule Of Reason Conflicts With The Rulings Of This Court, The Seventh Circuit, And Another Panel Of The Ninth Circuit**

In its 2-1 decision below, the panel majority properly ruled that the *per se* rule is inapplicable to CDA's Code of Ethics. App. 18a. In so holding, the majority noted that CDA's ethical policies "do not, on their face, ban truthful, nondeceptive ads" and "the economic impact of the restraint is not immediately obvious." App. 17a-18a. Nonetheless, the majority applied an abbreviated rule of reason to CDA's disclosure requirements. App. 18a-19a. Because the practices in issue are not facially anticompetitive, the Court's use of the "quick look" is squarely at odds with this Court's decision in *NCAA*, and decisions by the Seventh Circuit and another panel of the Ninth Circuit.

At issue in *NCAA* were association rules that limited the number of televised football games and set the price for television rights. As the rules, on their face, fixed prices and reduced output, the Court concluded that the "anticompetitive consequences of this arrangement are apparent." *Id.* at 104. The trial court in *NCAA* found actual increased prices and reduced output caused by the challenged rules. *Id.* at 113. Thus, this Court condemned the practices under an abbreviated rule of reason without "a detailed market analysis." *Id.* at 109. In contrast, the ALJ in *CDA* explicitly found that the challenged advertising policies had *no effect* on price or output. App. 262a.

Construing *NCAA*, courts of appeals have held that an abbreviated rule of reason is appropriate only where a restraint is, on its face, anticompetitive. *Brown*, 5 F.3d at 669.

Absent such a restraint, a court must analyze the conduct's competitive effects under the traditional rule of reason approach. "Unless the practice 'almost always' makes consumers worse off, it is not subject to condemnation without more detailed study of its effects -- including proof of market power and actual injury." *Illinois Corporate Travel*, 806 F.2d at 727.

*Illinois Corporate Travel* involved a prohibition against discount advertising. 806 F.2d at 724. The Seventh Circuit refused to apply the "quick look" analysis even while acknowledging that the rule is "functionally" a price restriction. The court concluded that the rule is not a naked restraint because it "does not 'always or almost always' work to consumers' detriment." *Id.* at 724, 728. The prohibition had the possible effect of curtailing free-riding. *Id.* at 728-29. Since "some potential benefits" of the practice were proffered, "summary denunciation" of the rule as facially anticompetitive was inappropriate. *Id.*

Similarly, the Ninth Circuit refused to apply an abbreviated rule of reason in *American Ad*, 92 F.3d 781. That case involved a change in a seller's commission policy to eliminate agent discounting. The Ninth Circuit affirmed summary judgment in favor of the seller, rejecting application of the abbreviated rule of reason:

[T]his so-called quick look analysis is the exception, rather than the rule. Proving injury to competition in a rule of reason case almost uniformly requires a claimant to prove the relevant market and to show the effects of competition within that market. . . . [T]he present case does not present the type of naked restraint on price or output that would justify a quick look.

*Id.* at 789-90 (internal quotations and citation omitted). The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice recently expressed the Di-

vision's view that the "quick look" be applied only to the "narrow" range of facially anticompetitive practices that "directly limit competition on price or output." Joel I. Klein, *A Stepwise Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST, Spring 1998, at 41, 42 ("Klein").

The Ninth Circuit's "quick look" condemnation of CDA's policies is directly at odds with *NCAA*, *Illinois Corporate Travel*, *American Ad*, and the views of the Antitrust Division. The CDA panel majority applied an abbreviated rule of reason to practices that it concedes "do not, on their face, ban truthful, nondeceptive [advertising]." App. 18a. Further, the majority acknowledged that CDA's justification for its policies -- preventing false and misleading advertising -- is a "legitimate, indeed pro-competitive, goal;" and it conceded "that as a general matter disclosure can augment competition and increase market efficiency by providing consumers more information." App. 19a. The ALJ confirmed CDA's "legitimate interest in fostering truthful, informative advertising" and that "scrutiny of dental advertising is pro-competitive." App. 245a-46a, 258a.

Given these findings by the Ninth Circuit and the ALJ, it is impossible to view CDA's policies as naked restraints. As Judge Real's dissent emphasized:

What the CDA was attempting to accomplish by its rules concerning advertising did not amount to a restraint on price competition. . . . What the CDA was monitoring was that dentists who wish[] to advertise discounts would have to fully disclose to the public the nature of the discounts. *Full disclosure is neither price fixing nor is it a ban on non-deceptive advertising.*

App. 25a-26a (emphasis added).

It is even more plain that CDA's policies regarding *non-price* quality advertising do not constitute a "naked" restraint

that might warrant a “quick-look” analysis. The Commission itself admitted that CDA’s activities concerning “nonprice advertising are entitled to an examination under the rule of reason” because “we cannot say with equal confidence that . . . ‘the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.’” App. 73a.

By using an abbreviated rule of reason to condemn CDA policies which, on their face, are not naked restraints, the panel majority has strayed far afield from the limited use of the quick look approved in *NCAA* and supported by the Antitrust Division. Further, the court’s ruling is flatly inconsistent with the decisions in *Illinois Corporate Travel* and *American Ad*, which rejected the quick look even as to conduct with greater anticompetitive potential than that at issue here. The defendant in *Illinois Corporate Travel* prohibited discount advertising altogether, which the court acknowledged was “functionally” a price restriction. 806 F.2d at 724. Similarly, the defendant in *American Ad* completely eliminated commissions paid to sales agents. 92 F.3d at 783. In contrast, CDA’s policies do not tamper directly with price or output, requiring only certain disclosures to reduce the risk that consumers will be misled.

An irreconcilable conflict exists between the Ninth Circuit’s decision in *CDA* and *NCAA*, *Illinois Corporate Travel* and *American Ad*. That conflict threatens to broaden application of the “quick look” rule of reason to condemn conduct that, as here, has no anticompetitive effect. The Court should grant certiorari to resolve this conflict.

### C. Use Of The Abbreviated Rule Of Reason In The Face Of CDA’s Proffered Procompetitive Justification Conflicts With The Decisions Of The Third And Seventh Circuits

The manner in which the Ninth Circuit applied the abbreviated rule of reason also is in fundamental conflict with the decisions of other courts of appeals. The Ninth Circuit condemned CDA’s advertising policies despite a procompetitive justification and a finding by the ALJ that the policies had no anticompetitive effect. This ruling is at odds with the Third Circuit’s decision in *Brown*, 5 F.3d 658, and the Seventh Circuit’s decision in *Vogel*, 744 F.2d 598.

*Brown* involved an agreement among Ivy League colleges to award financial aid only on the basis of need and to collectively determine the amount of financial aid for commonly admitted students. While the agreement was a naked restraint, the colleges met their burden under *NCAA*’s “quick look” to come forward with “some competitive justification.” *Id.* at 669. The need-based aid policies potentially widened the scope of students who could afford an Ivy League education. *Id.* at 669; 676-677. Given this explanation, the Third Circuit concluded that the arrangement potentially “enhances consumer choice” and that, rather than suppress competition, the agreements “may in fact merely regulate competition in order to enhance it.” *Id.* at 677. The court held that the agreement must be judged under a “full-scale rule of reason analysis.” *Id.* at 678.

In *Vogel*, the Seventh Circuit refused to invalidate an association’s ethical bylaw under the “quick look” rule of reason, even though the bylaw “‘tamper[ed]’ with a ‘price structure.’” 744 F.2d at 601. The court declined to condemn the bylaw unless “it has clear anticompetitive consequences and lacks any redeeming competitive virtues.” *Id.* at 603. The court determined that the bylaw had a sound procompetitive rationale – it barred a fee structure which incents

overstated valuations. *Id.* Accordingly, the plaintiff was required to demonstrate at trial that the bylaw was unreasonable under a full-blown rule of reason — *i.e.*, to establish a relevant market, a substantial market share by the association's members, and an anticompetitive effect which exceeded any procompetitive benefits. *Id.* at 604.

The Ninth Circuit's *CDA* ruling cannot be reconciled with *Vogel* and *Brown*. Both decisions required a traditional rule of reason analysis of facially anticompetitive conduct once the defendant proffered a plausible procompetitive justification. The Antitrust Division recently expressed the same view. *Klein*, ANTITRUST, Spring 1998, at 42-43. *CDA*'s advertising bylaws have the procompetitive purpose of augmenting consumer information to prevent deceptive advertising. Thus, the Ninth Circuit was required to abandon the "quick look" and apply a full-scale rule of reason analysis.

The importance of a full-scale rule of reason analysis where a plausible procompetitive rationale is tendered is demonstrated by this case. After a full trial, the ALJ found:

the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has *no impact on competition* in any market in the State of California, *particularly with respect to price and output*.

App. 246a (emphasis added). The ALJ also found that "complaint counsel have not produced *any* convincing evidence that CDA members have acted or could act together to raise prices or reduce output." *Id.* at 262a (emphasis added).

Moreover, the Commission failed to establish (i) a relevant market, (ii) that CDA had market power, or (iii) that there were high entry barriers. *Id.* Given that the very purpose of the rule of reason is to determine a restraint's impact on competition, *NCAA*, 468 U.S. at 103, the ALJ's finding of

no anticompetitive effect should have been dispositive. Instead, as Judge Real stated, "the majority finds a restraint on competition without the supporting help from any of the economic principles to be applied to a full market power analysis." App. 26a.

Commissioner Azcuenaga's dissent points out the glaring shortcomings of the Commission's case on competitive effects:

In presenting their case, complaint counsel relied on a theory of virtual *per se* illegality and did not offer evidence, even in the form of testimony of an expert economist, on fundamental elements of a rule of reason analysis, such as market definition, barriers to entry and anticompetitive effects.

App. 110a. She also laid bare the fallacy of the Commission's inferences of market power:

*The evidence does not support the conclusion that CDA can control the price and output of dental services in California.* The majority relies on the single fact that approximately 75 percent of California dentists are members of CDA to support its finding of market power. . . . But even hypothesizing a relevant geographic market with membership similar to that statewide, entry could undercut any claimed ability to exercise market power, and the evidence suggests that entry is, in fact, easy.

\* \* \* \* \*

If CDA had successfully controlled its members to halt advertising, why would not the other 25 percent of dentists in California who are not CDA members expand their practices by advertising, and why would not newly licensed dentists or dentists from other areas step in to take advantage of the fact that CDA members had voluntarily tied their own hands in competition to

attract patients? The Commission finds it "implausible at best" that this would happen. *A better conclusion is that it is "implausible at best" that CDA has had any significant adverse effect on competition.*

App. 145a-46a (emphasis added, citation omitted).

*CDA*'s use of the abbreviated rule of reason to strike down a practice that has a procompetitive justification, and has been determined to have no anticompetitive effect, places it in fundamental conflict with *NCAA, Brown and Vogel*.

#### **D. Resolution Of The Inter-Circuit Conflict Created By *CDA* Is Critical To The Proper Administration Of The Antitrust Laws**

The broadened "quick look" rule of reason articulated in *CDA* is not confined to professional associations, but is applicable to all commercial enterprises. If the conflict caused by *CDA* remains unresolved, the ambiguity and over-inclusiveness of the *CDA* "quick look" will have serious adverse consequences for competition and consumer welfare throughout the economy.

The Court has long recognized that uncertainty in antitrust rules chills procompetitive conduct. *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963) ("unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded"). The Antitrust Division and the Commission have noted the importance of clear, uniform antitrust rules. See, e.g., Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care*, 4 Trade. Reg. Rep. (CCH) ¶ 13,153, at 20,799 (1996). Indeed, the Antitrust Division has acknowledged that "[t]he economy is harmed when lawful, efficient conduct is avoided because of legal uncertainty." Department of Justice, *Vertical Restraints Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,105, at 20,577 (1985) (withdrawn August 10, 1993). The potential

harm resulting from the circuit conflict created by *CDA* is particularly acute because it involves the proper application of the rule of reason, the foundation antitrust standard by which the vast majority of conduct is judged.

In contrast to the Third and Seventh Circuits, *CDA* applies the "quick look" to conduct that has no direct impact on price or output. In the Ninth Circuit's view, *CDA*'s disclosure requirements are "fairly" or "sufficiently" naked restraints. App. 18a, 20a. The obliquity of *CDA*'s new "standard" makes it impossible for businesses to predict with any confidence the practices to which an abbreviated rule of reason will be applied. Antitrust scholars have noted the confusion caused by the lack of a uniform "quick look" standard. James A. Keyte, *What It Is And How It Is Being Applied: The "Quick Look" Rule of Reason*, ANTITRUST, Summer 1997, at 21 ("Keyte"). The problem is compounded by the Ninth Circuit's treatment of *CDA*'s procompetitive justifications. *CDA* appears to require a defendant not only to proffer a plausible procompetitive justification, as in the Third and Seventh Circuits, but also to *prove* actual procompetitive benefits from the challenged conduct. App. 19a.

Placing this burden on the business whose practices are challenged virtually assures that the implementation of innovative and potentially procompetitive practices will be inhibited. Requiring proof of procompetitive benefits for any challenged conduct increases the risk that the antitrust laws' treble damage and attorneys' fees sanctions will be imposed. Klein, ANTITRUST, Spring 1998, at 44 ("the specter of deterring or condemning efficiency-enhancing arrangements cautions against imposing too great a burden on parties to horizontal agreements").

*CDA*'s approach also dramatically increases the likelihood that businesses instituting new initiatives will be forced to expend substantial attorneys' fees defending their conduct, even if ultimately successful. Summary dismissal of private

antitrust suits will become virtually impossible. Increasing these risks, as *CDA* does, can only harm consumer welfare by inhibiting the implementation of innovative business strategies. *See, Barry Wright Corp.*, 724 F.2d at 235-36 (overbroad antitrust rules can "chill" highly desirable pro-competitive" conduct). *See also*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3, 15 (1984) (condemnation of procompetitive or competitively neutral conduct is particularly costly to a competitive economy). The potential harm of *CDA*'s new abbreviated rule of reason is brought home by the fact that in this case a violation was found despite the ALJ's definitive conclusion that *CDA*'s enforcement of the Code "has no impact on competition in any market in the State of California, particularly with respect to price and output." App. 246a. One commentator predicted this very result from the type of "quick look" analysis employed by the Ninth Circuit. *Keyte*, ANTITRUST, Summer 1997, at 24 (imposing burden on defendants places them "at a distinct disadvantage and has the potential of condemning conduct that may well be 'efficient' without the government ever having to prove anticompetitive effects").

Earlier this term, the Court acknowledged that the use of legal short-cuts that permit a court to invalidate a practice without careful examination of its competitive impact, not only suppresses procompetitive conduct, but may also inadvertently facilitate practices that harm consumers. *Khan*, 118 S. Ct. at 283. The Court admonished that summary denunciation of a practice must be avoided except where experience with the practice enables a court "to predict with confidence that the rule of reason will condemn it." *Id.* at 279. In all other cases, the delicate balancing required to protect and enhance consumer welfare can be accomplished only by thorough analysis of a practice's competitive effect under the full-scale rule of reason. As then Judge Breyer noted in *Barry Wright Corp.*:

[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.

724 F.2d at 234.

The Ninth Circuit contravened these basic antitrust tenets in its opinion below. It used a "quick look" to strike down conduct which admittedly is not a naked restraint, and has no anticompetitive effects. Because the circuit conflict and uncertainty caused by *CDA* risks harming, rather than enhancing competition, the Court should grant certiorari to review the Ninth Circuit's decision.

### CONCLUSION

For all the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

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## **APPENDIX**

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**FOR PUBLICATION****UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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CALIFORNIA DENTAL ASSOCIATION,	)	No. 96-70409
<i>Petitioner,</i>	)	FTC Docket No.
v.	)	9259
	)	
FEDERAL TRADE COMMISSION,	)	OPINION
<i>Respondent.</i>	)	

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Petition for Review of an Order  
of the Federal Trade Commission

Argued and Submitted  
July 16, 1997-San Francisco, California

Filed October 22, 1997

Before: Herbert Y.C. Choy and Cynthia Holcomb Hall,  
Circuit Judges, and Manuel L. Real, District Judge.

Opinion by Judge Hall; Dissent by Judge Real

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**SUMMARY**

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**Business Law/Regulation of Professions**

The court of appeals affirmed a decision of the Federal Trade Commission (FTC). The court held that a private trade association unreasonably restrains competition by enforcing its ethics rules to restrict truthful and nondeceptive advertising by members.

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<sup>\*</sup> Hon. Manuel L. Real, United States District Judge for the Central District of California, sitting by designation.

Although membership in petitioner California Dental Association (CDA) is not a condition to obtaining a dentist's license from the State of California, about 75 percent of licensed dentists practicing in the State are members. CDA is a nonprofit corporation under California and federal tax law.

CDA provides members with various services relating to the practice of dentistry; its subsidiaries offer them financial and other services that pertain less directly to the profession. CDA membership also allows access to similar benefits from the American Dental Association, of which CDA is a part.

As a condition of membership, dentists agree to follow the CDA Code of Ethics, which authorizes discipline for unprofessional conduct and violations of state law relating to the practice of dentistry. The Code contains standards for advertising by members. On their face, the rules prohibit false or misleading advertising with respect to prices and quality of services.

The CDA's Judicial Council produces advisory opinions that elaborate on the ethical standards. These include proscriptions against the use of words or phrases of comparison, e.g., "as low as," "and up," "lowest prices." Advisory opinion 8 states that because claims as to the quality of services cannot be quantified or verified, they are likely to be false or misleading. The CDA advisory opinions substantially mirror provisions of the California Business and Professions Code.

According to CDA advertising guidelines on volume discounts, dentists must specify the amount of the nondiscounted and discounted fees, the duration of offers, verifiable fees, qualifying groups, and any other conditions. The guidelines and advisory opinions indicate that across-the-board discounts and descriptions of prices as "low" or "reasonable" do not comply with the Code.

CDA enforces its advertising restrictions. Violators are subject to a range of penalties, including expulsion. Applicants for membership must conform their advertising to CDA's standards, or face rejection.

The FTC brought a complaint against CDA, alleging that it applied the guidelines in a way that restricted truthful, nondeceptive advertising, in violation of federal law. It was the FTC's position that the restrictions on price advertising - an effective ban on volume discounts and statements describing prices as "low" or "reasonable" - were per se violations of § 1 of the Sherman Act and § 5 of the FTC Act.

CDA contended that its advertising restrictions did not violate the federal statutes because there was no evidence of an agreement in restraint of trade; there was no intent to restrain trade by enforcing them; and there was no actual restriction on truthful, nondeceptive advertising.

The FTC showed that CDA relied on the advisory opinions and guidelines in making decisions about members' advertising on appeals from disciplinary decisions, and on review of membership applications. Other evidence indicated that CDA advised component local organizations that advertising did not comply because it included "reasonable" or "affordable" language. The evidence conflicted as to whether the guidelines barred all across-the-board discounts. In some cases, the CDA advised members of objections to special offers, discounts for senior citizens and new patients, and determined that nonprice ads regarding quality of services were barred, irrespective of their truth.

An administrative law judge (ALJ) found that regardless of the truth or straightforwardness of the ads, CDA had barred members from representing that their prices were "low," "reasonable," or "affordable," and had effectively prohibited across-the-board discounts. The ALJ also concluded that CDA had considered money-back guarantees to be misleading and therefore impermissible.

The ALJ determined that the FTC had jurisdiction over CDA's activities, and that the advertising restrictions were inherently suspect and lacked a plausible efficiency justification. Although the ALJ found that CDA lacked market power, he ruled that it was unnecessary, and concluded that CDA had unreasonably restrained competition in violation of § 1 of the Sherman Act and § 5 of the FTC Act.

The FTC affirmed, ruling that the advertising restrictions were unlawful per se, and that the nonprice guidelines were unlawful under an abbreviated ("quick look") rule of reason analysis. The FTC found that CDA had sufficient market power to justify a finding of anticompetitive effect. CDA petitioned for review.

[1] The FTC has authority to prevent corporations from engaging in unfair or deceptive acts or practices. The question was whether the FTC erred in finding that CDA was a corporation within the meaning of the FTC Act. The FTC's authority turned on whether CDA is organized to carry on business for its own profit or that of its members.

[2] The FTC has consistently held that it has jurisdiction over a nonprofit entity if a substantial part of its activities provides pecuniary benefits to its members. It lacks jurisdiction if the beneficial activities are merely incidental to noncommercial activities.

[3] The FTC possessed jurisdiction over this case. Given that Congress apparently did not intend to provide a blanket exclusion for nonprofit corporations, the construction of the statute urged by CDA was too narrow. The FTC's approach of looking at whether the organization provides tangible, pecuniary benefits to its members as a surrogate for "profit" is a proper way of deciding which nonprofit organizations are subject to its jurisdiction.

[4] The CDA is engaged in substantial business activities that provide tangible, pecuniary benefits to its members.

Many of CDA's functions directly enhance the profits of members dentists. Other activities make members' practices more efficient and reduce their costs. The activities that were the subject of the FTC's order - regulation of advertising and solicitation - related particularly to the business affairs of its members. Under these circumstances, the FTC properly exercised its jurisdiction over CDA.

[5] It may be that some types of price advertising restrictions amount to bans on price competition that warrant per se condemnation. But per se analysis could not be endorsed in this case, which concerned a set of ethical guidelines promulgated for the purpose of preventing false and misleading advertising. The CDA's policies did not on their face ban truthful, nondeceptive ads. The allegation was that the rules were enforced in a way that restricts truthful advertising. This type of restriction did not warrant per se condemnation without further inquiry into its effects on competition.

[6] The rule of reason requires balancing the anticompetitive effects and possible efficiency gains or business justifications of the challenged practice. The FTC applied a quick look rule of reason analysis designed for restraints that are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry. It allows condemnation of a "naked restraint" on price or output without an elaborate industry analysis.

[7] The restraints CDA placed on price advertising amounted to a fairly "naked" restraint on price competition. Price advertising is fundamental to price competition. Restrictions on the ability to advertise prices normally makes it more difficult for consumers to find a lower price and for dentists to compete on the basis of price.

[8] Disclosure requirements can be so onerous that they actually stifle the information that consumers receive. CDA's disclosure requirements appeared to prohibit across-the board discounts because it is infeasible to disclose all the

information required. The record provided no evidence that the rule led to increased disclosure and transparency of dental pricing. On these facts, this justification required more than a quick look.

[9] The Commission also applied quick look analysis to the nonprice restrictions, which were in effect a form of output limitation. Limiting advertisements about quality and other nonprice aspects of service prevented dentists from fully describing the services they offered, and thus limited their ability to compete. The restrictions might also have affected output more directly, as quality and comfort advertising may induce customers to obtain care when they might not otherwise do so. While the danger existed that claims about quality are unverifiable and misleading, it did not justify banning all quality claims without regard to whether they were false or misleading. Under the circumstances, the restriction was a sufficiently naked restraint on output to justify a quick look analysis.

[10] Professional associations are routinely treated as continuing conspiracies of their members. CDA members are independent profit-seeking dentists in competition with each other. By joining CDA, they effectively agree to abide by its Code of Ethics. CDA's advertising policies and enforcement activities constituted a combination or agreement within the meaning of §1 of the Sherman Act.

[11] Whatever CDA's motivation, the point of the advertising policy was to limit the types of advertising in which dentists could engage, and thereby restrict a form of competition. Good motives will not validate an otherwise anticompetitive practice.

[12] On its face, the Code extended only to false and misleading advertisements. [13] It may have been true that there was some confusion within CDA about the extent to which truthful price advertising was restricted. But there were enough examples of CDA objections to truthful ads to find that substantial evidence supported the FTC's conclusion.

[14] There was sufficient evidence that CDA restricted non-price advertising without consideration of whether it was true or false.

[15] Although the Commission did not engage in a detailed analysis of market power, and its conclusions on this issue conflicted with those of the ALJ, they sufficed under the quick look rule of reason in light of the nature of the restraints. The relevant product market was dentistry and the relevant geographic market was local. The fact that approximately 75 percent of licensed dentists in California belong to CDA was fairly strong evidence of market share. It strongly suggested that CDA's market share was high.

[16] The Commission found that there were significant barriers to entry in the form of licensing and education that converted market share to market power. Exclusion appeared to present a significant hardship for some dentists. Even if the benefits could have been obtained elsewhere, their availability in a single package from CDA gave CDA an edge over the competition. These circumstances suggested that CDA possessed enough market power to harm competition.

[17] Given the facially anticompetitive nature of the advertising restrictions, the evidence of CDA's large market share and influence justified finding a violation under the quick look rule of reason.

Judge Real dissented, expressing the view that because CDA has nothing to do with competition in the dental profession, the FTC lacked jurisdiction.

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#### COUNSEL

Peter M. Sfikas, Bell, Boyd & Lloyd, Chicago, Illinois, for the petitioner.

Ernest J. Isenstadt, Assistant General Counsel, Federal Trade Commission, Washington, D.C. for the respondent.

## OPINION

HALL, Circuit Judge:

The California Dental Association ("CDA") petitions for review of an order of the Federal Trade Commission ("FTC") that it cease and desist from restricting certain types of advertising by its members. The issues are whether the FTC has jurisdiction over the CDA and whether substantial evidence supports its conclusion that the CDA's advertising policies, as applied, unreasonably restrain trade in violation of Section I of the Sherman Act, 15 U.S.C. § 1, and Section 5 of the FTC Act, 15 U.S.C. § 45. We have jurisdiction pursuant to 15 U.S.C. § 45(c) and affirm.

### I. BACKGROUND

#### A. The CDA

The CDA is a trade association for licensed dentists in the State of California. It is part of the American Dental Association ("ADA") and is itself composed of 32 local "component societies." Individual dentists must be a member of a local component to belong to the CDA, and must belong to the CDA to join the ADA. CDA membership is not a condition to obtaining a dentist's license from the state, but roughly 75 percent of the practicing licensed dentists in California belong to it. The CDA is organized as a nonprofit corporation under California law and federal tax law.

The CDA provides its members a variety of services, such as lobbying, marketing and public relations, seminars on practice management, assistance in compliance with OSHA and disability requirements, continuing education, placement services, and administrative procedures for handling patient complaints. It also has several for-profit subsidiaries from

which members can obtain liability and other types of insurance, financing for equipment purchases, long-distance calling discounts, auto leasing, and home mortgages. CDA membership also allows access to a broad range of similar benefits from ADA membership.

#### B. The CDA's Advertising Policy

As a condition of membership, dentists agree to follow the CDA Code of Ethics, which provides that dentists may be disciplined for unprofessional conduct and violations of state law relating to the practice of dentistry. This case concerns the Code's ethical standards concerning advertising. The basic rule is set out in section 10 of the Code, which states,

"Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect."

The CDA's judicial Council, which is responsible for enforcing the Code, has released the following advisory opinions elaborating upon the ethical standard for advertising:<sup>1</sup>

2. A statement or claim is false or misleading in any material respect when it:

a. contains a misrepresentation of fact;

<sup>1</sup> According to the Preamble of the Code, advisory opinions are not binding on members but "may be considered as persuasive by the trial body and any disciplinary proceedings under the CDA Bylaws."

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- b. is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;
- c. is intended or is likely to create false or unjustified expectations of favorable results and/or costs;
- d. relates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors;
- e. contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as "as low as," "and up," "lowest prices," or words or phrases of similar import.

4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity—for example, "low fees"—must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity.

8. Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect.

The advisory opinions substantially mirror parts of the California Business and Professions Code. *See* Cal. Bus. & Prof. Code §§ 651, 1680. The CDA claims that its Code, as explained by the advisory opinions, is intended to ensure that dentists comply with these laws.

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The CDA has also issued an additional set of advertising guidelines intended to help members comply with the Code of Ethics and state law. According to the section on discount advertising, state law requires dentists offering discounts to list all of the following in the advertisement:

1. The dollar amount of the nondiscounted fee for the service;
2. Either the dollar amount of the discount fee or the percentage of the discount for the specific service;
3. The length of time that the discount will be offered;
4. Verifiable fees; and
5. Specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount.

According to the testimony of current and former CDA officials, the state Board of Dental Examiners generally does not pursue violations of state laws on advertising by dentists, and CDA has attempted to fill in the gap with its own enforcement efforts.

Both the CDA and its component societies enforce the CDA's advertising rules. Typically, components undertake the initial investigation into a member's advertising and, if possible, resolve the matter at the local level without CDA's involvement. Thus, if a component ethics committee concludes that a member's advertising is false or misleading in violation of the Code, it asks the member to discontinue or modify the advertisement. If the member does not agree or the component is unsure of how to apply the relevant standard under the Code, the case is referred to the CDA Judicial Council, which holds a hearing. If it finds a violation, and no settlement can be reached, the CDA can impose a range of penalties including censure, suspension and expulsion.

The CDA and its components also review the advertisements of applicants for membership. If the applicant does not agree to discontinue noncomplying advertisements, and the component intends to deny the application for that reason, it can refer the case to the CDA's Membership Application Review Subcommittee. After its own review, the subcommittee recommends to the component that it grant or deny membership. Applicants who are new dentists have sometimes been offered conditional admission under which they must agree to bring their advertisements into compliance within a year. Since 1990, some dentists have been admitted on condition that the component counsel them about their advertising and that the dentist agree to comply with its advice.

### C. Proceedings Before the ALJ

The Commission's complaint against the CDA alleged that the organization applied its advertising guidelines in a way that restricted truthful, nondeceptive advertising.<sup>2</sup> It contended that this practice violated Section I of the Sherman Act, 15 U.S.C. § 1, and consequently Section 5 of the FTC Act, 15 U.S.C. § 45. After a trial, the ALJ found that CDA had barred members from representing that their prices were "low," "reasonable" or "affordable. He also found that the CDA effectively prohibited across-the-board discounts by requiring dentists to post the nondiscounted price for all of the services subject to the discount. In both cases, the policy did not take into account whether the ads were false or misleading. In addition, he found that CDA restricted much advertising based on quality because it might imply superiority over other dentists and is difficult to verify. The CDA also considered money-back guarantees to be misleading and therefore impermissible.<sup>3</sup>

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<sup>2</sup> The Complaint does not charge the CDA's component societies.

<sup>3</sup> At one time, the CDA barred advertising that attempted to allay patients' fears (so-called "gentleness claims"). It has since changed its policy.

The ALJ concluded that the FTC had jurisdiction over the CDA's activities. Applying the FTC's decision in *In re Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988) ("Mass. Board"), he held that the advertising restrictions were inherently suspect and lacked a plausible efficiency justification. Although he found that the CDA lacked market power, he held that a showing of market power was unnecessary under the *Mass. Board* standard. Consequently, he determined that the CDA had unreasonably restrained competition in violation of Section 1 of the Sherman Act and Section 5 of the FTC Act.

### D. Proceedings before the Commission

The majority of the Commission affirmed, on somewhat different reasoning. Chairman Pitofsky's opinion did not rely on *Mass. Board* but instead held that the restrictions on price advertising were unlawful per se.<sup>4</sup> It further held that the nonprice advertising guidelines were unlawful under an abbreviated rule of reason analysis. It disagreed with the ALJ and found that CDA possessed sufficient market power to justify a finding of anticompetitive effect. Commissioner Starek concurred in the result but would have applied the *Mass. Board* reasoning. Commissioner Azcuenaga dissented, arguing that there was insufficient evidence to anticompetitive acts and market power to hold CDA liable under Section 5 of the FTC Act. The CDA timely petitions for review.

### II. Standard of Review

We review the FTC's findings of fact and economic conclusions under the substantial evidence standard. See 15 U.S.C. § 45(c); *Olin Corp. v. FTC*, 986 F.2d 1295, 1297 (9th Cir. 1993). Accordingly, we uphold them if they are based on "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Id.* We do examine the

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<sup>4</sup> In the alternative, it held that they failed an abbreviated rule of reason analysis.

findings of the full Commission more closely when they differ from those of the ALJ, however. *Litton Ind. v. FTC*, 676 F.2d 364, 369 (9th Cir. 1982). We review issues of law de novo, but treat with some deference the FTC's informed judgment that a particular commercial practice violates the FTC Act. See *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986); *Olin*, 986 F.2d at 1297.

### III. Jurisdiction

[1] As an initial matter, we address the FTC's jurisdiction over the CDA. The Commission has the authority to prevent "persons, partnerships or corporations" from engaging in unfair methods of competition and unfair or deceptive acts or practices. 15 U.S.C. § 45(a)(2). The question here is whether the FTC erred in finding that the CDA was a corporation within the meaning of the statute. The FTC Act's definition of corporation includes any company or association, "incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. As a nonprofit organization under California law, the CDA is an incorporated company without shares of capital. The FTC's authority thus turns on whether the CDA is organized to carry on business for its own profit or that of its members.

[2] This court has not addressed the exact meaning of this language, and consequently the extent of the FTC's jurisdiction over nonprofit entities. The FTC has consistently held that it has jurisdiction over a nonprofit entity if a substantial part of the entity's total activities provides pecuniary benefits to its members. See *In re American Medical Assoc.*, 94 F.T.C. 701, 983-84 (1980), *aff'd*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982) ("AMA"). It lacks jurisdiction, however, if the beneficial activities are merely incidental to noncommercial activities. *Id.*

Among the other circuits there is a split on the issue, and although the Supreme Court agreed to review the matter in *AMA*, it was equally divided and produced no opinion. See 455 U.S. at 676. The Eighth Circuit has held that a community blood bank was outside the FTC's jurisdiction because it was run for charitable purposes, rather than for its own profit or that of its members. *Community Blood Bank v. FTC*, 405 F.2d 1011, 1022 (8th Cir. 1969). The court held that the FTC has jurisdiction over an entity that engages "in business for profit within the traditional meaning of that language." *Id.* at 1018. Profit, the Eighth Circuit said, was gain from business or investment over and above expenditures. *Id.* at 1017. Alternatively, it defined the test as whether "dividends or other pecuniary benefits are contemplated to be paid to members." *Id.*

The Second and Seventh Circuit have applied a somewhat more expansive view of "profit." In affirming the FTC's decision in *AMA*, which involved an organization much more like CDA than the one in *Community Blood Bank*, it held that despite its many charitable functions, the AMA engaged in sufficient business activities to support jurisdiction. See 638 F.2d 443, 448 (2d Cir. 1980). It distinguished *Community Blood Bank* as involving a purely charitable organization and focused on the fact that the FTC's cease and desist order concerned advertising, solicitation and contractual relationships, which relate to business rather than charitable functions. *Id.* The Seventh Circuit took a similar approach in *FTC v. Nat'l Comm'n on Egg Nutrition*, 517 F.2d 485, 487-88 (7th Cir. 1985), which upheld jurisdiction over a trade association of egg producers. It relied on the fact that the association was intended to promote the general interests of the egg industry. It also found that the association was organized for the profit of the industry even though it pursued that profit indirectly— by trying to increase egg consumption and allaying fears about cholesterol. *Id.* at 488.

[3] We agree with the approaches of the Second and Seventh Circuits and hold that the FTC possessed jurisdiction

over this case. Given that Congress apparently did not intend to provide a blanket exclusion for nonprofit corporations, *see Community Blood Bank*, 405 F.2d at 1017, we think that the construction of the statute urged by CDA is too narrow. While we agree with the Eighth Circuit that truly charitable organizations should be exempt from the FTC's reach, we would not exclude the many nonprofit corporations that conduct substantial commercial and related activities. They may not directly distribute "gain" to their members in the same sense as a for-profit corporation, but no genuine nonprofit entity does. The FTC's approach of looking at whether the organization provides tangible, pecuniary benefits to its members as a surrogate for "profit" is a proper way of deciding which nonprofit organizations are subject to its jurisdiction.

[4] Under this standard, we are confident that the facts of this case support the FTC's jurisdiction. Like the AMA and the National Commission on Egg Nutrition, the CDA is engaged in substantial business activities that provide tangible, pecuniary benefits to its members. Many of the CDA's functions, such as marketing, and lobbying for insurance and Medicare reform, directly enhance the profits of member dentists. Other activities, such as continuing education and financing assistance, indirectly make members' practices more efficient and reduce their costs. Furthermore, the activities that are the subject of the FTC's order—the regulation of advertising and solicitation—relate particularly to the business affairs of its members. The FTC is not purporting to regulate the CDA's charitable or educational activities; as in *AMA*, the Commission is concerned with CDA behavior that directly affects the profitability of its members' practices. Under these circumstances, the FTC properly exercised jurisdiction over the CDA.

#### IV. Analysis of the Advertising Restrictions

##### A. Legal Standard

###### 1. Price Advertising

The Commission concluded that the CDA's restrictions on price advertising—namely, the effective ban on volume discounts and statements describing prices as "low" or "reasonable"—were *per se* violations of Section 1 of the Sherman Act and Section 5 of the FTC Act. We disagree with its use of *per se* analysis but sustain its alternative conclusion that an abbreviated rule of reason analysis applies.

There is some support among older cases for the FTC's use of *per se* scrutiny. *See United States v. Gasoline Retailers Ass'n*, 285 F.2d 688, 691 (7th Cir. 1961) (finding ban on price signs to be part of conspiracy to stabilize prices). In recent cases, however, *per se* analysis has only applied to price fixing, output limitations, horizontal market divisions, tying, and group boycotts. *See American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996). The Supreme Court, and this court, have been unwilling to expand the categories of conduct subject to the *per se* prohibitions. *See NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 100 (1984); *American Ad Management*, 92 F.3d at 784-85. This is especially true where the economic impact of the restraint is not immediately obvious, *see Indiana Federation of Dentists*, 476 U.S. at 458-59, and where the restraint is a rule adopted by a professional organization. *See National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 692-96 (1978).

[5] We do not doubt that the FTC has gained considerable experience with advertising restrictions since *AMA*. *See Mass. Board*, 110 F.T.C. at 549. It may be correct that some types of price advertising restrictions amount to bans on price competition that warrant *per se* condemnation. *See*

*Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 344 (1982) ("Once experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."). But we cannot endorse the use of *per se* analysis in this case, which concerns a set of ethical guidelines promulgated by a professional organization for the apparent purpose of preventing false and misleading advertising. Unlike the situation in *AMA* and *Mass. Board*, the CDA's policies do not, on their face, ban truthful, nondeceptive ads. The allegation instead is that the rules have been enforced in a way that restricts truthful advertising. The value of restricting false advertising (which may itself violate the FTC Act) counsels some caution in attacking rules that purport to do so but merely sweep too broadly. As a result, we do not believe that this type of restriction warrants *per se* condemnation without further inquiry into its effects on competition.

[6] We therefore analyze the restraints under the rule of reason, which requires balancing the anticompetitive effects and possible efficiency gains or business justifications of the challenged practice. *See Professional Engineers*, 435 U.S. at 691. In this case, the FTC applied an abbreviated, or "quick look," rule of reason analysis designed for restraints that are not *per se* unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry. *See NCAA*, 468 U.S. at 109-10 & n.39 ("The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." (internal quotations omitted)). It allows the condemnation of a "naked restraint" on price or output without an "elaborate industry analysis." *Id.* at 85. Although we have held that the quick look analysis should be the exception, rather than the rule, *see American Ad Management*, 92 F.3d at 789, we conclude that the FTC properly applied it here.

[7] The restrictions CDA placed on price advertising amounted in practice to a fairly "naked" restraint on price competition itself. As the Commission and courts have

found, price advertising is fundamental to price competition—one of the principal concerns of the antitrust laws. It plays an "indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). Restrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price. *See id.*; *Morales v. Trans World Airlines*, 504 U.S. 374, 388 (1992). This is particularly true of a restriction on advertising price discounts, a significant basis of price competition. *See Mass. Board*, 110 F.T.C. at 605.

[8] The complexity in this case is that CDA asserts as justification for its restrictions the legitimate, indeed procompetitive, goal of preventing false and misleading price advertising. In particular, it claims, the rules simply require more disclosure, which enhances rather than limits price competition. We agree that as a general matter disclosure can augment competition and increase market efficiency by providing consumers more information. The problem is with the nature and amount of disclosure required. As the Supreme Court has recognized in other contexts, disclosure requirements can become so onerous that they actually stifle the information that consumers receive. *Morales*, 504 U.S. at 389-90. In practice, CDA's disclosure requirements appear to prohibit across-the-board discounts because it is simply infeasible to disclose all of the information that is required. Indeed, the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing. Consequently, we do not think this possible justification, on these facts, requires more than a quick look under the rule of reason.

## 2. Nonprice Advertising

[9] The Commission also applied the quick look rule of reason analysis to the nonprice restrictions, such as the effective ban on quality and superiority claims. These restrictions are in effect a form of output limitation, as they

restrict the supply of information about individual dentists' services. See Areeda & Hovenkamp, *Antitrust Law* ¶ 1505 at 693-94 (Supp. 1997). Limiting advertisements about quality, safety and other nonprice aspects of service prevents dentists from fully describing the package of services they offer, and thus limits their ability to compete. The restrictions may also affect output more directly, as quality and comfort advertising may induce some customers to obtain nonemergency care when they might not otherwise do so. CDA contends that claims about quality are inherently unverifiable and therefore misleading. While this danger exists, it does not justify banning all quality claims without regard to whether they are, in fact, false or misleading. Under these circumstances, we think that the restriction is a sufficiently naked restraint on output to justify quick look analysis. We also note in this regard the Supreme Court's repeated holdings that the scope of inquiry under the rule of reason is intended to be flexible depending on the nature of the restraint and the circumstances in which it is used. See *Indiana Federation of Dentists*, 476 U.S. at 459; *Professional Engineers*, 435 U.S. at 688, 692.

#### B. Substantial Evidence

CDA challenges whether substantial evidence supports the FTC's conclusion that CDA's policies violated the rule of reason. Finding a violation under the rule of reason requires a showing of (1) an agreement, conspiracy or combination between two or more entities, (2) intent to restrain competition, (3) actual injury to competition, and (4) an unreasonable restraint as determined by balancing the harm caused by the restraint and any procompetitive benefits from it.<sup>5</sup> *American Ad Management*, 92 F.3d at 788-89. In particular, CDA contends that the Commission has not produced evidence that there was an agreement with the intent to restrain trade, that CDA in fact restricted truthful, nondeceptive advertising, and that CDA had sufficient

<sup>5</sup> The restraint must also affect interstate commerce, but the parties do not address this issue on appeal.

market power for its regulations to actually harm competition.

#### 1. Agreement

[10] CDA first argues that there was no evidence of an agreement in restraint of trade. We disagree. Professional associations are "routinely treated as continuing conspiracies of their members." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (quoting 7 P. Areeda, *Antitrust Law* ¶ 1477, at 343 (1986)). CDA members are independent, profit-seeking dentists in competition with each other. By joining the CDA, they effectively agree to abide by the CDA's Code of Ethics. CDA's advertising policies and accompanying enforcement activities thus constitute a combination or agreement within the meaning of Section 1 of the Sherman Act.

#### 2. Intent

[11] CDA further argues that it did not intend to restrain trade. Instead, it contends, the purpose of the Code of Ethics was merely to comply with state law. But whatever its motivation, the point of the advertising policy was clearly to limit the types of advertising in which dentists could engage, and thereby restrict a form of competition. "Good motives will not validate an otherwise anticompetitive practice." *NCAA*, 468 U.S. at 101 n.22.

#### 3. Effect of Restrictions

[12] A more difficult question is whether substantial evidence supports the Commission's conclusion that CDA in fact restricted truthful, nondeceptive advertising. On its face, the Code only extends to false and misleading advertisements. The Commission found that through its pattern of enforcement, the CDA went beyond the literal language of its rules to prohibit ads that were in fact true and

nondeceptive.<sup>6</sup> The CDA's advisory opinions and guidelines indicate that across-the-board discounts and descriptions of prices as "reasonable" or "low" do not comply with the Code. Although these guidelines are not directly binding on member dentists, the Commission staff presented evidence that the CDA has relied on them in making decisions about members' advertising on appeals from disciplinary decisions by component societies and on review of membership applications referred by components. In numerous cases, the CDA advised components that advertising did not comply because it included "reasonable" or "affordable" language.

[13] Similar evidence supports its findings on the issue of discounts. Although Dr. Kinney, one member of the Judicial Council, testified that the guidelines might not bar all across-the-board discounts, other testimony is to the contrary. For example, one member suggested that advertising a "senior citizen discount, standing alone, would violate the rules. The Commission's opinion cites numerous cases in which the CDA advised members of objections to special offers, senior citizen discounts, and new patient discounts, apparently without regard to their truth. It may be that there is some confusion even within the CDA about the extent to which truthful price advertising is restricted. But there are enough examples of CDA objections to truthful ads to find that substantial evidence supports the FTC's conclusion.

[14] In terms of the nonprice advertising, advisory opinion eight expressly states that claims as to the quality of services are inherently likely to be false or misleading. The evidence before the ALJ demonstrates that the CDA,

<sup>6</sup> CDA also contends that any anticompetitive harm was caused by the independent actions of its components, over which it had no control. But CDA set the overall standards used by the components and in numerous cases cited by the Commission was directly involved in disciplinary and admission proceedings for individual dentists. There was enough evidence to conclude that CDA itself was responsible for the anticompetitive activity.

following this guideline, has often advised components that the Code of Ethics bars such claims, without any inquiry into whether or not, in a particular case, they were true. On numerous occasions, CDA also informed its components that guarantees were barred by state law. Taken together, there is sufficient evidence that the CDA restricted nonprice advertising without any particular consideration of whether it was true or false.

#### 4. *Market Power*

[15] Showing that the restraints harmed competition under the rule of reason typically requires some analysis of market power. Although the Commission did not engage in a detailed analysis of market power, and its conclusions on this issue conflict with those of the ALJ, we conclude that they suffice under the quick look rule of reason in light of the nature of the restraints involved. The FTC correctly concluded that the relevant product market is dentistry and the relevant geographic market is local. The fact that approximately 75 percent of licensed dentists in California belong to the CDA is fairly strong evidence of market share. While this fact alone does not indicate what the market shares are in particular localities, it strongly suggests that at least in many, CDA's market share is quite high.

[16] The Commission also found that there are significant barriers to entry in the form of licensing and education which tend to convert this market share into market power. In addition, CDA membership offers sufficient benefits that exclusion appears to present a significant hardship for some dentists. CDA membership is necessary for membership in the ADA, which itself provides prestige and valuable benefits. The record does not show that dentists are willing to forego CDA membership rather than give up their advertisements. In fact, some dentists stated they feared losing the economic benefits of membership, such as insurance, if they were expelled or denied membership because of advertising. Even if the benefits from membership can be obtained elsewhere, their availability in a single

package from CDA certainly gives CDA an edge over other options. Taken together, these circumstances suggest that CDA possesses enough market power to harm competition through its standard setting in the area of advertising.

[17] It is true that the FTC did not engage in the full economic analysis of market power often required under the full rule of reason. But as Professor Areeda argues, "What constitutes sufficient proof [of market power] will vary enormously both with the type of restraint and with common knowledge. . . . If large scale professional organizations like the American Medical Association promulgate rules against advertising, a court will see a significant restraint that needs to be analyzed without careful market definition." 7 P. Areeda, *Antitrust Law* ¶ 1503, at 377. Given the facially anticompetitive nature of both the price and nonprice advertising restrictions, the evidence of the CDA's large market share and influence justifies finding a violation under the quick look rule of reason.

#### Conclusion

The FTC correctly exercised its jurisdiction over the CDA. Substantial evidence supports the FTC's conclusion that the advertising rules of the CDA, as applied to truthful and non-deceptive advertisements, violate Section 1 of the Sherman Act and Section 5 of the FTC Act under an abbreviated rule of reason analysis. Accordingly, we AFFIRM the decision of the FTC and ENFORCE its cease and desist order.

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REAL, District Judge, dissenting.

I dissent.

The history and background of this matter has been well delineated by the majority so I need not repeat it here.

I dissent because I believe that the California Dental Association (CDA) is a non-profit professional association that does not operate commercially. Rather the CDA simply makes available to its members services that can best be provided through a group in order to obtain the best price and service from outside business enterprises; i.e., insurance companies, equipment suppliers, telephone services, auto leasing and financing. The CDA has nothing to do with competition in the dental profession. As such the California Dental Association is not subject to the authority of the Federal Trade Commission. *Community Blood Bank of Kansas City Area, Inc., v. F.T.C.*, 405 F.2d 1011 (8th Cir. 1969). These nonprofit membership organizations have no place in the commercial world of the F.T.C. The majority appears to base their F.T.C. jurisdictional ruling on "pecuniary benefits" that do not in any way result from the business of the Association but rather from the individual action of the members in group procurement to obtain the best price from outside sources that compete for their business. The members are true consumers of competitive products offered to them through their group—the CDA.

Assuming arguendo that the F.T.C. has jurisdiction to regulate the CDA, the majority's approval of the quick look analysis to the Rule of Reason used by the F.T.C. cannot be supported. The rules of the CDA as presented to the F.T.C. are not per se a restraint on competition in the dental profession nor are they sufficiently anti-competitive on their face to eschew a full-blown rule of reason inquiry.

What the CDA was attempting to accomplish by its rules concerning advertising did not amount to a restraint on price competition. In its efforts to self-monitor the dental

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profession in the relationship of its members to the public, the CDA was attempting to guard against misleading or unreliable advertising by its members. What the CDA was monitoring was that dentists who wishes to advertise discounts would have to fully disclose to the public the nature of the discounts. Full disclosure is neither price fixing nor is it a ban on non-deceptive advertising. The advertising provisions of the CDA's Code of Ethics does not in any way infringe upon the rights of any member to advertise providing the advertising is not "false or misleading in any material respect." If Section 10 of the Code is applied erroneously to any member's advertising there are provisions to appeal the decision to the CDA Judicial Council, and of course ultimately to the courts of the State of California.

The majority agrees that, at worst, a Rule of Reason inquiry is applicable to the anti-competition claims of the F.T.C. They also agree that the Rule of Reason is the "rule" and that the quick look is the exception. Yet in the absence of any naked restraints they still attempt to satisfy the use of the exception. Furthermore, the majority funds a restraint on competition without the supporting help from any of the economic principles to be applied to a full market power analysis.

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UNITED STATES OF AMERICA

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BEFORE

FEDERAL TRADE COMMISSION

DOCKET NO. D-9259

IN THE MATTER OF:

California Dental Association

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ORDER

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

Commissioners: Robert Pitofsky, Chairman  
Mary L. Azcuenaga  
Janet D. Steiger  
Roscoe B. Starek, III  
Christine A. Varney

In the Matter of )  
 )  
 )  
 )  
CALIFORNIA DENTAL ) Docket No. 9259  
ASSOCIATION, )  
a corporation. )  
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FINAL ORDER

The Commission has heard this matter on the appeal of Respondent California Dental Association from the Initial Decision, and on briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to affirm the Initial Decision, and to issue this Final Order. Accordingly, the Commission enters the following Order.

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Respondent" or "CDA" means the California Dental Association, its directors, trustees, councils, committees, boards, divisions, officers, representatives, delegates, agents, employees, successors and assigns.

B. "Component societies" means those dental societies or dental associations defined as component societies in the June 1986 edition of CDA's Bylaws. In the event that CDA's Bylaws are amended to denominate component societies differently or to define or describe a new category of dental societies or associations that replace or are substantially similar to the component societies defined in the June 1986 edition of CDA's Bylaws, "component societies" means those dental societies or dental associations as well.

C. "Person" means any natural person, corporation, partnership, unincorporated association, or other entity.

D. "Restricting" includes taking any action against a dentist based on the advertising practices of the dentist's employer.

II.

IT IS FURTHER ORDERED that respondent, directly or indirectly, or through any corporate or other device, in or in connection with its activities as a professional association in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, restricting, regulating, impeding, declaring unethical, or interfering with the advertising or publishing by any person of the prices, terms or conditions of sale of dentists' services, or of information about dentists' services, facilities or equipment which are offered for sale or made available by dentists or by any organization with which dentists are affiliated, including, but not limited to, advertising or publishing:

1. Superiority claims;
2. Comparative claims;
3. Quality claims;
4. Subjective claims and puffery;
5. Prices, including discounted prices;
6. Promises to refund money to dissatisfied customers;
7. Claims that include the use of adjectives or superlatives to describe any offered service; and
8. Exclusive methods or techniques.

B. Prohibiting, restricting, regulating, impeding, declaring unethical, or interfering with the solicitation of patients, patronage, or contracts to supply dentists' services by any dentist or by any organization with which dentists are affiliated, through advertising or by any other means, including, but not limited to, the distribution of business cards and forms containing a dentist's name, business address, or telephone number in connection with dental screenings of children at public and private schools.

C. For a period of ten (10) years after the date this Order becomes final, inducing, requesting, suggesting, urging, encouraging, or assisting any non-governmental person or organization to take any action that if taken by respondent would violate Part II.A. or II.B. of this Order.

PROVIDED, HOWEVER, that nothing contained in this Order shall prohibit respondent from formulating, adopting, disseminating to its component societies and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence.

PROVIDED FURTHER, that nothing in this Order shall prohibit respondent from encouraging its members to obey state law or from disciplining any member as a result of that member's reprimand, discipline, or sentence by any court or any state authority of competent jurisdiction.

### III.

IT IS FURTHER ORDERED that respondent shall:

A. Within sixty (60) days after the date this Order becomes final, remove from respondent's Code of Ethics and from its Bylaws and any other policy statement or guideline of respondent, any provision, interpretation, or policy statement that is inconsistent with the provisions of Part II of this Order, including but not limited to:

1. Sections 10 and 22 of respondent's Code of Ethics; and
2. Advisory Opinions 2(c), 2(d), 3, 4, and 8 to Section 10 of respondent's Code of Ethics.

B. Terminate for a period of one (1) year respondent's affiliation with any component society within one hundred and twenty (120) days after respondent learns or obtains information that would lead a reasonable person to conclude that said component society has, after the date this Order becomes final, engaged in any act or practice that if committed by respondent would be prohibited by Part II of this Order; unless prior to the expiration of the one hundred twenty (120) day period, said component society informs respondent by a verified written statement of an officer of the society that the component society has eliminated and will not reimpose the restraint(s) in question, and respondent has no grounds to believe otherwise.

IT IS FURTHER ORDERED that respondent shall:

A. Within ninety (90) days after the date this Order becomes final, publish in the Journal of the California Dental Association ("CDA Journal"), or any successor publication, with such prominence and in the same size type as feature articles are regularly published in the CDA Journal, or any successor publication, and with customary form and scope of distribution of the CDA Journal, or any successor publication, and separately distribute by first class mail to each of its component societies and to each of its members:

1. This Order, the accompanying complaint, and an announcement in the form shown in Appendix A to this Order; and
2. Any documents revised pursuant to Part III.A. of this Order.

B. For each person who, because of the advertising or solicitation practices of the person or the person's employer, currently is subject to a CDA disciplinary order, or currently is suspended from membership in CDA:

1. Within thirty (30) days after this Order becomes final, distribute by first class mail a copy of this Order, the accompanying complaint, and an announcement in the form shown in Appendix B to this Order;
2. Within one hundred and twenty (120) days after the date this Order becomes final, (a) review the person's file, and (b) determine whether the suspension or disciplinary order is consistent with Part II of this Order; and
3. Within one hundred and twenty (120) days after the date this Order becomes final, send by

first class mail a letter notifying the person whether CDA has lifted the suspension and or vacated the disciplinary order, and, if not, detailing the reasons for maintaining the suspension or retaining the disciplinary order.

C. For each person currently not a member of CDA who, because of the advertising or solicitation practices of the person, or of the person's employer:

1. has been expelled from CDA during the ten (10) year period preceding the date this Order becomes final; or
2. has been denied membership in CDA, or any CDA component, during the ten (10) year period preceding the date this Order becomes final; or
3. was contacted by CDA, or any CDA component, during the ten (10) year period preceding the date this Order becomes final, and who subsequently resigned from CDA;

take the following steps:

Within one hundred and twenty (120) days after this Order becomes final, distribute by first class mail a copy of this Order, the accompanying complaint, an announcement in the form shown in Appendix C to this Order, and an application form for membership in CDA; and

Within forty-five (45) days after the date an application from such person for membership is received, (i) review the application, and (ii) send by first class mail a letter notifying the person whether membership has been granted, and, if not, detailing the reasons for the denial.

D. For five (5) years after the date this Order becomes final, distribute by first class mail a copy of this Order, the accompanying complaint, and an announcement in the form shown in Appendix A to this Order to each person who applies for membership in CDA within thirty (30) days after CDA receives an application from such person.

## V.

IT IS FURTHER ORDERED that respondent shall:

A. For a period of three (3) years after the date this Order becomes final, create and maintain a written record in each instance in which respondent or one of its component societies takes action with respect to advertising for the sale of dental services. The record required by this paragraph shall, at a minimum, clearly specify the particular representation that is alleged to be false or deceptive, and the basis for concluding that the particular advertisement is false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

B. Within six (6) months after the date that this Order becomes final, and every six (6) months thereafter for a period of three (3) years, file with the Federal Trade Commission, Bureau of Competition, Division of Compliance, copies of each and every record created pursuant to Part V.A. of this Order.

## VI.

IT IS FURTHER ORDERED that respondent shall:

A. Establish, within sixty (60) days after the date this Order becomes final, and maintain for a period of five (5) years thereafter, a compliance program to aid in ensuring that respondent and its component societies act in conformance with the requirements of Parts II through V of this Order. Said compliance program shall include, at a minimum:

1. Establishing a compliance officer or committee that shall supervise review of the activities of respondent and its component societies with respect to advertising; and
2. Establishing procedures to ensure that respondent receives written notice of all action, whether formal or informal, taken by respondent's component societies with respect to advertising.

B. Within one hundred and twenty (120) days after the date this Order becomes final, file with the Federal Trade Commission a verified report in writing setting forth in detail the manner and form in which respondent has complied and is complying with this Order.

C. Within one (1) year after the date this Order becomes final, annually thereafter for a period of five (5) years, and at such other times as the Federal Trade Commission may by written notice to respondent request, file a verified report in writing with the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this Order, and setting forth in detail any action taken in connection with the activities covered by this Order, including, but not limited to, any advice or interpretation rendered with respect to advertising or solicitation, and all written communications, all summaries of oral communications, and all disciplinary actions taken with respect to advertising or solicitation.

D. For a period of five (5) years after the date this Order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II, III, IV, and V of this Order, including but not limited to any advice or interpretation rendered with respect to advertising or solicitation, and all written

communications, all summaries of oral communications, and all disciplinary actions taken with respect to advertising or solicitation.

E. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed changes in respondent, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that this Order will terminate twenty (20) years from the date it becomes final, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later;

PROVIDED, HOWEVER, that the filing of such a complaint will not affect the duration of:

- A. Any paragraph in this Order that terminates in less than twenty (20) years;
- B. This Order's application to any respondent that is not named as a defendant in such complaint; and
- C. This Order if such complaint is filed after the Order has terminated pursuant to this paragraph.

PROVIDED FURTHER, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this paragraph as though the complaint was never filed, except that the Order will not terminate between the date such complaint is filed and the

later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Azcuenaga dissenting.

Donald S. Clark  
Secretary

Seal

Argued: November 15, 1995

Issued: March 25, 1996

Attachments:

- 1) Appendices A-C
- 2) Opinion of the Commission
- 3) Dissenting Opinion of Commissioner Azcuenaga
- 4) Opinion of Commissioner Starek, Concurring in Part and Dissenting in Part

## APPENDIX A

[Date]

ANNOUNCEMENT

The Federal Trade Commission has issued an order against the California Dental Association ("CDA"). This order provides that CDA may not prohibit its members from, or restrict its members in, engaging in truthful, nondeceptive advertising or solicitation.

As a result of the order, CDA may not interfere if its members or their employers wish to:

1. advertise or publish truthful, nondeceptive:
  - (a) superiority claims;
  - (b) comparative claims;
  - (c) quality claims;
  - (d) subjective claims and puffery;
  - (e) prices, including discounted prices;
  - (f) promises to refund money to dissatisfied customers;
  - (g) claims that include the use of adjectives or superlatives to describe any offered service; or
  - (h) exclusive methods or techniques.
2. engage in the solicitation of patients, including by means of distributing business cards and forms containing a dentist's name, business address, or

telephone number in connection with dental screenings of children at public or private schools.

The order does not prevent CDA from formulating and enforcing reasonable ethical guidelines prohibiting representations, including unsubstantiated or unverifiable representations, that CDA reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or guidelines prohibiting the solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence.

In particular, the order means that as long as CDA's members do not engage in falsehood or deception, CDA cannot prevent or discourage them from advertising or otherwise soliciting patients, except with respect to "uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence."

For more specific information, you should refer to the FTC order itself, a copy of which is enclosed.

Bernard L. Allamano  
General Counsel  
California Dental Association

APPENDIX B

[Date]

ANNOUNCEMENT

As you may be aware, the Federal Trade Commission has issued an order against the California Dental Association ("CDA"). This order provides that CDA may not prohibit its members from, or restrict its members in, engaging in truthful, nondeceptive advertising or solicitation. In addition, the order requires CDA, within 45 days after the order became final, to review (a) all current suspensions of CDA membership, and (b) all disciplinary orders, imposed because of the advertising or solicitation practices of a member or the advertising or solicitation practices of the member's employer. The order requires CDA, within 60 days after the order became final, to inform each such member in writing that the suspension has been lifted or the disciplinary order vacated; if not, CDA is required to give detailed reasons for maintaining the suspension or retaining the disciplinary order.

CDA is currently reviewing your case to determine whether the disciplinary action taken against you is in accordance with the FTC order. For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed.

If you have any questions concerning the status of CDA's review of your case, feel free to contact the Association at ( ). You may also contact the Federal Trade Commission.

Bernard L. Allamano  
General Counsel  
California Dental Association

APPENDIX C

[Date]

ANNOUNCEMENT

As you may be aware, the Federal Trade Commission has issued an order against the California Dental Association ("CDA"). The order provides that CDA may not prohibit its members from, or restrict its members in, engaging in truthful, nondeceptive advertising or solicitation. Pursuant to the order, CDA is sending a membership application form to dentists, such as you, who because of their advertising or solicitation practices, or the advertising or solicitation practices of their employers:

1. have been expelled from CDA during the ten (10) year period preceding the date the order became final;
2. have been denied membership in CDA, or any CDA component, during the ten (10) year period preceding the date the order became final; or
3. were contacted by CDA, or any CDA component, during the ten (10) year period preceding the date the order became final, and who subsequently resigned from CDA.

The order requires CDA, within 45 days after it receives an application from any such person, to act on the application and inform the applicant whether membership has been granted and, if not, to detail the reasons for the denial.

CDA encourages you to apply for membership. If you apply for membership, your application will be considered in accordance with the terms of the FTC order. For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed.

If you have any questions concerning application, feel free to contact the Association at ( ). You may also contact the Federal Trade Commission.

Bernard L. Allamano  
General Counsel  
California Dental Association

### ***OPINION OF THE COMMISSION***

By Pitofsky, Chairman:

This is a case in which a large percentage of dentists located in California, operating through their trade association, the California Dental Association ("CDA"), placed unreasonable restrictions on members' truthful and nondeceptive advertising of the price, quality, and availability of their services. We find such restrictions on competition through regulation of advertising to be a violation of Section 5 of the Federal Trade Commission Act. In reaching that conclusion, we find that CDA is not a "not for profit" organization beyond the reach of FTC authority, that its actions affect interstate commerce, and that CDA and its members are capable of conspiracy and have conspired to impose these advertising restrictions.

The order that we impose leaves CDA free to regulate false and misleading forms of marketing and advertising by its members, but does not allow it to impose broad categorical bans on truthful and nondeceptive advertising of the price, quality, or availability of dental services.

#### **I. BACKGROUND**

The complaint in this case, issued on July 9, 1993, charges respondent with restraining competition among dentists in California in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1995) ("FTC Act" or "Act"), by placing unreasonable restrictions on its members' truthful and nondeceptive advertising of the price, quality, and availability of their services. After extensive pretrial discovery, a three-week trial, and post-trial motions, the record was closed on April 20, 1995, and a decision and final order were entered by the administrative law judge ("ALJ"), Lewis F. Parker, on July 17, 1995.

The ALJ first rejected CDA's arguments that the Commission lacks jurisdiction because CDA is not

"organized to carry on business for its own profit or that of its members," within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44, and that its activities do not restrain or affect interstate commerce within the meaning of Sections 4 and 5 of the Act, 15 U.S.C. §§ 44 and 45. The ALJ found that CDA's actions affect interstate commerce, ID at 65-67<sup>1</sup>, and that, notwithstanding CDA's status as a nonprofit corporation, the association confers a substantial pecuniary benefit on its members so as to place it within the Commission's jurisdiction under *Community Blood Bank of Kansas City Area, Inc. v. F.T.C.*, 405 F.2d 1011 (8th Cir. 1969), and *American Medical Association*, 94 F.T.C. 701 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) ("AMA"), ID at 67-71. The ALJ next rejected CDA's contention that, just as a corporation cannot legally conspire with its wholly owned subsidiary, CDA could not, as a matter of law, conspire with its members and local components. The ALJ determined that unlike a corporation whose economic interests are fused with those of its wholly owned subsidiary, CDA is an association of competing dentists who are legally capable of conspiracy and who, by agreeing to abide by the Code of Ethics, have conspired with one another and with CDA and its local component societies to restrict advertising. ID at 71-72.

Turning to the legality of the individual restraints, the ALJ concluded that the members of CDA by agreement had unreasonably withheld from the public information regarding the prices, discounts, quality, superiority, guarantees, and availability of services of member dentists, as well as information about their use of procedures to diminish

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<sup>1</sup> The following abbreviations are used in this opinion:

ID - Initial Decision of the ALJ

IDF - Numbered Findings in the ALJ's Initial Decision

CX - Complaint Counsel's Exhibit

RX - Respondent's Exhibit

T - Transcript of Trial before the ALJ

patients' anxiety. ID at 74-75. The complaint did not challenge the right of members of CDA through their association to suppress advertising that was misleading or deceptive or otherwise caused unavoidable and unreasonable harm to consumers. Accordingly, the ALJ enjoined CDA from further interference with advertising by member dentists, except insofar as CDA has a reasonable basis for concluding, *i. e.*, reasonably believes, that such advertising is false or deceptive within the meaning of Section 5 of the FTC Act, or with respect to the solicitation of patients who may be particularly vulnerable to undue influence. ID at 80-82.

CDA appeals from the Initial Decision on the grounds that the ALJ erred in concluding that CDA is a corporation within the meaning of Section 4 of the FTC Act, that CDA is capable of conspiring with its members and its component societies, and that CDA's actions were unlawful under Section 5 of the Act<sup>2</sup>. Our analysis of the liability issues and assessment of certain facts differ from the ALJ's but we nonetheless reach the same conclusion on liability and, accordingly, affirm the Initial Decision as modified below and adopt the ALJ's findings of fact except insofar as they are inconsistent with this opinion<sup>3</sup>.

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<sup>2</sup> CDA does not appear to challenge the ALJ's conclusion that its activities had the requisite nexus to interstate commerce, and, in any event, we affirm the ALJ's conclusion on this score without further elaboration.

<sup>3</sup> Complaint Counsel's Motion To Correct The Record And To Supplement A Response Given At The Oral Argument (filed on December 6, 1995), and Respondent's Motion For Leave To File CDA's Response To Questions Posed During Oral Argument Regarding Whether CDA Is Responsible For The Actions Of The Components (filed on March 7, 1996) are hereby granted. Respondent's Response To Questions Posed During Oral Argument Regarding Whether CDA Is Responsible For The Actions Of The Components (filed as an attachment to the March 7, 1996 motion), and Complaint Counsel's Reply To CDA's Response To Certain Questions Posed During Oral Argument (filed on March 18, 1996), have been considered by the Commission, and are disposed of by the Final Order and Opinion of the Commission.

## II. RESPONDENT

CDA is a professional association, organized under California law as a non-profit corporation, with its principal place of business in Sacramento, California. CDA is composed of 32 local component societies, and is itself a constituent member of the American Dental Association ("ADA") (which is not a party to this suit). IDF 3-4. To qualify for membership at the state level, CDA requires a dentist to be a member of the local component society in the jurisdiction where the dentist practices. Similarly, a California dentist is not eligible for membership in the ADA without membership in CDA. IDF 3-4. Each CDA member must abide by the codes of ethics of the local component to which the dentist belongs, the CDA, and the ADA, CX 1450-Y; IDF 5, and expressly promises to do so in his or her application by signing the following statement:

"I CERTIFY that I have read the *Constitution, Bylaws, Code of Ethics* and the *Principles of Ethics* of the dental society, the California Dental Association, and the American Dental Association, and upon submission of this application I will comply with the *Constitution, Bylaws, Code of Ethics* and the *Principles of Ethics* of the dental society, the California Dental Association, and the American Dental Association, and I further agree that I will recognize the authorized officers of said society and said associations as the proper and sole authorities to interpret all areas of professional conduct and will at all times abide by and be governed by their interpretations." CX 1258-E.

Each organization's code and bylaws must not conflict with those of the association of which it is a part. CX 1450-I; IDF 4.

The CDA has more than 19,000 members. Between 13,500 and 13,700 are in active practice, representing around 75 percent of the practicing dentists in California. IDF 2. In some communities, CDA may represent an even larger share of the practicing dentists. For example, in 1994 the Mid-

Peninsula Dental Society, whose region included Palo Alto, claimed to represent over 90 percent of practicing dentists in its area. CX 1433.

CDA is run on the principle of parliamentary supremacy. Its House of Delegates, composed of about 200 CDA members, chosen mainly by the components, has the power to amend CDA's articles of incorporation, adopt and amend its Code of Ethics, determine and assess dues, adopt an annual budget, grant or revoke the charters of its component societies, and elect its officers, Council members, and delegates to the ADA House of Delegates. IDF 9; CX 1450-K; CX 1472-A. Aside from a managing Board of Trustees and a number of standing committees, the CDA operates ten Councils, one of which is the Judicial Council, which is charged with interpreting and enforcing CDA's Code of Ethics. IDF 10-23. The Judicial Council's Membership Application Review Subcommittee ("MARS"), in turn, examines whether applicants have complied with the Code of Ethics. IDF 14; IDF 157.

## III. JURISDICTION

CDA challenges the ALJ's conclusion that it is a corporation "organized to carry on business for its own profit or that of its members," within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44. First, it maintains that the ALJ applied the wrong legal standard, arguing that the ALJ ignored the two-pronged approach set forth in *College Football Association*, 5 Trade Reg. Rep. (CCH) ¶ 23,631 (July 8, 1994) ("CFA"), by applying the test laid out in the Commission's earlier decision in *American Medical Association*, 94 F.T.C. 701. Second, CDA argues that dentists do not in fact derive any pecuniary benefit from their membership in CDA and that any activity that might be characterized as for profit is ancillary to its nonprofit mission and therefore does not suffice to confer jurisdiction upon the FTC. We disagree.

Under Section 5, as amended, the Commission is authorized to "prevent persons, partnerships, or corporations," with certain exceptions not relevant here, "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). Section 4, as amended, in turn, defines the term "corporation":

"Corporation' shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44.

The statute does not further specify the boundary of the for-profit limit to our jurisdiction (or nonprofit exemption as it is alternatively known), and the test we apply was first articulated in *Community Blood Bank of Kansas City Area, Inc. v. F.T.C.*, 405 F.2d 1011 (8th Cir. 1969). In that case, the Eighth Circuit rejected the notion that a corporation's nonprofit organizational form places it beyond the Commission's jurisdiction. An examination of the legislative history of the Act led the court to conclude that "Congress did not intend to provide a blanket exclusion of all non-profit corporations, for it was also aware that corporations ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members." 405 F.2d at 1017. See also *F.T.C. v. National Commission on Egg Nutrition*, 517 F.2d 485, 487-88 (7th Cir. 1975), cert. denied, 426 U.S. 919 (1976). The Eighth Circuit explained that the nonprofit exemption extends only to

corporations that are "in law and in fact charitable," 405 F.2d at 1019, and concluded:

"[U]nder § 4 the Commission lacks jurisdiction over nonprofit corporations without shares of capital which are organized for and actually engaged in business for only charitable purposes, and do not derive any 'profit' for themselves or their members within the meaning of the word 'profit' as attributed to corporations having shares of capital." *Id.* at 1022.

We applied this standard in *AMA*, 94 F.T.C. 701, where we ultimately found that the American Medical Association had violated Section 5 of the FTC Act by restricting advertising and solicitation by its members. In finding jurisdiction we rejected the *AMA*'s claim that the statutory term "profit" was limited to direct gains distributed to its members. Nor did we accept the organization's claim that the mere existence of substantial, eleemosynary activities would place it beyond the purview of the statute. We agreed, instead, with the ALJ, who had decided that the Commission can "assert jurisdiction over nonprofit organizations whose activities engender a pecuniary benefit to its members if [those] activiti[es are] a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." *Id.* at 983 (citation omitted). We have since adhered to that formulation of the reach of our jurisdiction over nonprofit organizations. See, e.g., *Michigan State Medical Society*, 101 F.T.C. 191, 283-84 (1983).

As the ALJ correctly observed, our subsequent decision in *CFA* is consistent with *AMA*. See ID at 68. *CFA* addressed the question whether a nonprofit organization, all of whose members are not for-profit entities, is subject to the Commission's jurisdiction when it engages in commercial activity and distributes the income earned from that activity to its members. As we noted in *CFA*, our jurisdictional analysis in that case did not call *AMA* into question. We reiterated that "a finding that a substantial part of an association's activities engender[s] pecuniary benefits for

profit-seeking members is sufficient to establish that the association is organized to carry on business 'for the profit' of its members." *Id.* at 23,362. *AMA* proved insufficient, however, to decide the jurisdictional question in *CFA*, since "a finding that such activities engender pecuniary benefits for entities that are not for-profit is not [a sufficient basis to establish jurisdiction]." *Id.* We were thus compelled to press on in *CFA* to ensure that no other aspect of the organization's activities could serve as a jurisdictional predicate.

Drawing on *Community Blood Bank* and our review of federal tax law, we concluded that Section 4 imposes a two-pronged test that looks to both the source and destination of an organization's income. "The not-for-profit jurisdictional exemption under Section 4," we held, "requires both that there be an adequate nexus between an organization's activities and its alleged public purposes and that its net proceeds be properly devoted to recognized public, rather than private, interests." *Id.* at 23,357. Because *CFA*'s activities bore a sufficient nexus to its charitable purposes and because its income was distributed entirely to members who were not for-profit entities, we concluded that it met both prongs and, accordingly, was exempt from our jurisdiction.

As is plain from the opinion, an organization that falls short on either prong comes within our jurisdiction. Therefore, rather than undermine our decision in *AMA*, *CFA* simply adds an additional step of analysis when an organization satisfies the prong enunciated in *AMA*.

CDA falls within our jurisdiction for the same reasons the *AMA* did, and, as a result, we need not examine the nature of its activities in addition to the substantial pecuniary benefits it generates for its members. CDA, like the *AMA*, is organized as a nonprofit corporation under state law and is exempt from federal income taxes under Internal Revenue Code § 501(c)(6), 26 U.S.C. § 501(c)(6) (1995), which applies to "business leagues, chambers of commerce, real estate boards and boards of trade" consisting of members that

share common business interests. See 26 C.F.R. § 1.501(c)(6)-1 (1995). It thus apparently does not qualify for exemption under I.R.C. § 501(c)(3), 26 U.S.C. § 501(c)(3), which exempts organizations that are "organized and operated exclusively for [eleemosynary purposes] . . . no part of the net earnings of which inures to the benefit of any private . . . individual." This status is pertinent to our jurisdictional analysis, but in applying the *AMA* test, we nonetheless review for ourselves whether CDA confers pecuniary benefits upon its members as a substantial part of its activities. See 94 F.T.C. at 990 n.17.<sup>4</sup>

In deciding that the *AMA*'s activities engendered pecuniary benefits to its members, the Commission pointed to founding documents and promotional literature indicating that one of the *AMA*'s goals was to serve the "material interests" of the medical profession and provide "tangible benefits and services to its members," such as insurance programs, a retirement plan, a physician placement service, publications, authoritative legal information, and practice management programs. See 94 F.T.C. at 986-87 (citations omitted). The Commission also cited the *AMA*'s legislative and lobbying efforts on behalf of physicians as an important tangible benefit provided by the organization to its members. *Id.* at 987; see also *Michigan State Medical Society*, 101 F.T.C. at 283-84.

CDA offers many similar benefits and bills itself as an organization that "represent[s] dentists in all matters that affect the profession," CX 1546-A; IDF 63, and that "offers far more services to its members than any other state [dental] association," CX 1544; IDF 67. For instance, CDA engages in lobbying activities that have been repeatedly described by CDA's president as saving members significant amounts of

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<sup>4</sup> We find no reason at this time to adopt, as complaint counsel urges, a rebuttable presumption "that any trade or professional association with a 501(c)(6) tax classification . . . operate[s] in substantial part for the economic benefit of its members, and therefore [is] subject to Commission jurisdiction." Brief for Complaint Counsel at 17-18.

money, IDF 72, 74, provides practice management seminars, IDF 92, marketing and public relations services, IDF 86-88, and, through for-profit subsidiaries, offers its members professional liability insurance, business and personal insurance, and financial services, IDF 109-18. Indeed, the last time CDA made a comprehensive accounting of the allocation of its resources, only 7 percent was spent on "[s]ervices to the [p]ublic," while 65 percent funded "[d]irect [m]ember [s]ervices," 20 percent was used for "[a]ssociation [a]dministration & [i]ndirect [m]ember [s]ervices," and 8 percent went to defray the costs of "[m]embership [m]aintenance." CX 1448-C; IDF 69. In sum, without questioning whether CDA engages in activities that benefit the public, we agree with the ALJ that the services CDA provides to its members satisfy the jurisdictional threshold of the Act. See ID at 69-71.

#### IV. CONSPIRACY

CDA next challenges the legal and factual basis of the ALJ's finding that it conspired or combined with its members and component societies to restrict unreasonably the dissemination of information and thereby restrain competition. First, CDA argues that it is legally incapable of conspiring with its members or its component societies, because they form a single economic unit much like a corporation and its wholly owned subsidiary, which generally cannot conspire with one another. Brief for Respondent 68 - 69 (citing *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984) ). Second, it maintains that there exists no requisite, conspiratorial unity of purpose among the component societies or between CDA and its components to restrict advertising or restrain competition, and that each component has instead prohibited what it independently perceived to be false and misleading advertising. *Id.* at 47-53. We disagree with both assertions.

Section 1 of the Sherman Act does not reach the unilateral acts of a single firm, but only restraints of trade achieved by "contract, combination . . . or conspiracy' between separate

entities." *Copperweld*, 467 U.S. at 768 (emphasis in original)<sup>5</sup> In *Copperweld*, the Court considered whether a parent company and its wholly owned subsidiary could provide the requisite plurality of actors under Section 1, and it held that they could not:

"A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny." *Id.* at 771.

In other words, where a group of persons or corporations do not pursue independent economic motives, they are viewed as a single economic entity, akin to a firm and its executives, and are thus deemed incapable of entering into a conspiracy within the meaning of Section 1. This principle is inapposite here, however.

Unlike firms that are acquired by a parent corporation, dentists do not shed their economic identities as competitors in the dental services market upon joining the association. Thus, in contrast to the strategies of a single firm, or a parent and its wholly owned subsidiary, CDA's policies and decisions regarding the market activities of its member dentists embody a continuing agreement among competitors.

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<sup>5</sup> Although the FTC has no independent authority to enforce the Sherman Act, its authority under Section 5 of the FTC Act extends to conduct that violates the Sherman Act. See, e.g., *F.T.C. v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953); *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457, 463-64 (1941). While the reach of Section 5 is broader than that of the Sherman Act, we need not lay out the precise scope of Section 5 in this case because, as we indicate below, see *infra* Section V, the instant practice makes out a violation of Section 1 of the Sherman Act, 15 U. S. C. § 1. Cf. *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 454-55 (1986).

Indeed, were we to conclude otherwise, a cartel would evade liability under Section 1 simply by organizing itself as a trade association.

Quite properly, then, professional associations are "routinely treated as continuing conspiracies of their members," as Professor Areeda has pointed out. VII Phillip E. Areeda, *Antitrust Law* ¶ 1477, p.343 (1986); see *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (citing same). For example, in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), the Court declared a professional association's ethics rule prohibiting competitive bidding by its members to be in violation of Section 1, noting in passing that "[i]n this case we are presented with an agreement among competitors." Similarly, in *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 455 (1986), the Supreme Court found that there was "no serious dispute" that members of the respondent organization had "conspired among themselves" by promulgating a policy restricting the information its members would provide insurance companies. And in one of its more explicit statements on the subject, the Court in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 99 (1984) ("NCAA"), expressly rejected a single entity defense when it examined a rule promulgated by an association composed of institutions who were otherwise competitors in the market for "television revenues, . . . fans and athletes," noting that "[b]y participating in an association which prevents member institutions from competing against each other . . . member institutions have created a horizontal restraint." As we said in *Michigan State Medical Society*, 101 F.T.C. at 286 (citations omitted), "[t]here is ample precedent for finding that individual professionals, acting through their organizations, can conspire or combine to violate the antitrust laws."

We also reject CDA's factual contention that complaint counsel has failed to prove that the alleged conspirators shared "a unity of purpose or a common design and

understanding, or a meeting of minds in an unlawful arrangement." Brief for Respondent at 48 (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946) ). See also *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). CDA clearly promulgated the Code of Ethics, which, as noted in AMA, by itself "implies agreement among the members of [the] organization to adhere to the norms of conduct set forth in the code." *AMA*, 94 F.T.C. at 998 n.33. As part of their application to CDA, members expressly pledge to abide by the Code of Ethics as interpreted by the association's authorized officers. See CX 1258-E. And the Judicial Council (together with its Membership Application Review Subcommittee) interprets and enforces the Code of Ethics. IDF 14, 157. Therefore, despite CDA's attempt to portray the resulting restrictions as the product of independent, and often inconsistent, activities on the part of CDA and each component society, there is ample evidence in the record that the restrictions at the heart of this case were promulgated and enforced directly by, or at the direction of, CDA itself.

CDA's Code of Ethics and accompanying Advertising Guidelines require that all price advertising be exact and that discount advertising list the regular fee for each discounted service, the percentage of the discount, the length of time that the discount will be available, verifiable fees, and the specific groups who are eligible for the discount as well as any other limitation. CX 1484-Z-49 to 50; CX 1262-I. In enforcing these provisions, CDA has routinely cited members for using phrases such as "low," "reasonable," or "inexpensive" fees, see, e.g., CX 301-B & -D; CX 118 B, and for failing to include the regular fees for each service covered by across-the-board senior citizen discounts, or coupon discounts for new customers, see, e.g., CX 843-B, CX 585-A. See generally IDF 168-82.

CDA restricts nonprice advertising as well. See generally IDF 183-216, 294-317. CDA forbids "[a]dvertising claims as to the quality of services," CX 1484-Z-50, which include claims such as "quality dentistry," see, e.g., CX 1083-A;

CX 387-C, prohibits dentists from advertising that their services are superior to those of their competitors, see, e.g., CX 671-A; CX 43-B; CX 1026-A, bans the advertising of guarantees, see, e.g., CX 668-C; CX 557-C; CX 497-C, and has, on occasion, imposed burdens on dentists who have advertised their efforts to alleviate patient anxiety, see CX 70-A. Finally, CDA prohibits dentists from including information about their practice on forms distributed in connection with public or private school screenings. See, e.g., CX 1115-A; CX 1167-A.<sup>6</sup>

<sup>6</sup> Although the Initial Decision, IDF 168-216, 294-317, relies on statements and enforcement activities by both CDA and its local component societies, our independent review of the record reveals that CDA was specifically involved in numerous enforcement actions so as to make the challenged restraints its own, rather than only unrelated incidents of restrictions by local components. We do not address CDA's specific concerns regarding the ALJ's reliance on complaint counsel's summary document CX 1659, since our own review of the record does not rely on the challenged document.

Since 1990 alone, there have been scores of cases in which CDA actively participated in the enforcement of the various restrictions identified in the text. To name a few examples, in recent years CDA was consulted, issued an opinion, or required that action be taken with regard to the advertising of Dr. Hansa Asher (senior citizen discount, CX 18 A, CX 18 B (1993)), Dr. Walter Rosenkranz (new customer special, CX 865 E, CX 865 C (1993)), Dr. Noel Dorotheo (senior citizen discount, CX 333 F, CX 333 A (1993)), Dr. Joseph Foroosh (representations of superiority, CX 360 A (1986); discounts, CX 366 A (1993); state of the art dentistry, CX 66 A (1993)), Dr. John Baron (superiority claim, CX 43 B (1993)), Dr. Coulter Crowley (new patient discount, CX 248 B (1993)), Dr. Richard Casteen (senior citizen discount, CX 151 B (1993)), Dr. Henry Lerian (affordable costs, superiority claims, CX 605 A (1993)), Drs. Angelique and Katherine Skoulas (infection control standards, CX 963 A (1993)), Dr. Kumar Ramalingam (discount, CX 843 A (1993)), Dr. Russell Coser (pleasant dentistry, CX 232 (1993)), Dr. Gerald Brown (experience, CX 115 A (1993)), Dr. Darral Hiatt (discount, CX 444 A (1993)), Dr. Mark Rocha (discount, CX 855 A, CX 856 (1993)), Dr. Cheryl Johnston (experience, guarantees and discounts, CX 497 A-D (1993)), Dr. Brent Maiden (senior citizen discount, CX 646 C (1992)), Dr. Corey Nicholl (discounts, CX 775 A (1993)), Dr. Steven Williams (superiority and quality of care, CX 1083 A (1992)), Dr. Edward Norzagaray (superiority and senior discount, CX 780 A, CX 780

B (1992)), Dr. Roxanne Schleuniger (seniors discounts, CX 913 A (1992)), Dr. Eugene Kita (discounts for cash patients, guarantees, CX 557 B, CX 557 C (1992)), Dr. Gregory Skinner (senior citizen discount, affordable dentistry, and caring dentistry, CX 957 B, CX 957 C, CX 957 D-E (1992)), Dr. Phillip Jenkins (gentle, comfortable and affordable dentistry, CX 478 A (1992)), Dr. Howard Moy (discounts and affordable prices, CX 755 A, CX 755 B (1992)), Dr. Paro Ghadimi (discount for all new patients, sterilized environment, quality of care, CX 387 A, CX 387 C (1992)), Dr. Donald Reid (superiority, CX 848 C (1991)), Mickiewicz & Rye Dental Group (claim of superiority, CX 718 B (1992)), Dr. James Tracy (superiority claim, CX 1026 A (1992)), Drs. Grant and Randall Stucki (senior discount, guarantee, CX 1000 C (1992)), Dr. Christopher Go (superiority claim, CX 394 B (1993)), Dr. Leslie Latner (discount, experience, superiority, CX 583 (1991)), Dr. Farida Butt (discounts, experience, CX 126 A (1991)), Dr. Pargev Davtian (senior citizen discounts, CX 297 B (1991)), Dr. Nazameedin Beheshti (senior citizens discount, CX 49 A (1990); discounts, CX 51 A (1991)), Dr. Jack Dubin (affordable dentistry, CX 335 A (1991)), Dr. Gerald VanderAhe (endorsement and low prices, CX 1042 A, CX 1042 B (1991)), Dr. Thomas Bales (affordable financing, CX 32 A (1991)), Dr. Sean Moran (offer of discount, CX 745 D, E (1991)), Dr. Paige Jeffs (discount, special offer, CX 474 A-B (1990)), Dr. Michael Leizerovitz (quality for less, offers of discounts, special offer for x-rays, CX 602 A, CX 602 C, CX 602 D (1991)), Drs. William Kachele & Andrew Stygar (affordable dentistry, discounts, CX 514 A, CX 516 A, CX 516 C (1991)), Dr. Jack Rosenson (affordable dentistry, fair fees, representations of superiority, CX 866 A, CX 866 C (1991)), Dr. Indravadan Patel (discount, CX 828 D (1990)), Dr. Tarsem Singhal (affordable prices, CX 949 C (1990)), Dr. Daniel Tucker (reasonable fees, CX 1032 A (1990)), Dr. Greg Mardirossian (seniors discount, discount, CX 661 A (1990)), Dr. Mark A. Aguilera (expertise claims, discount, CX 4 A, B, C, (1990)), Dr. Leland Jung (affordable prices, CX 501 B (1990)), and Dr. Joseph Paulsen (low fees, CX 830, CX 830 G (1990)). See generally Complaint Counsel's Proposed Findings of Fact, Volume III, Proposed Findings 580-949, and exhibits cited therein.

A cross-section of CDA's involvement is provided by its actions with respect to the advertising of Dr. Kent Buckwalter (reasonable fees, and major savings, CX 118 B (1993)), Dr. Soodabeh Azarmi (coupon discount, CX 27 F (1993)), Dr. Dexter Massa (discounts and guarantee, CX 668 B, CX 668 C (1992)), Dr. Tony Daher (discount, CX 258 C (1993)), Dr. Christine Choi (percentage discount for new patients, CX 206 A (1992)), Valley Presbyterian Hospital (superiority, CX 354 (1992)), Dr. Trang Nguyen (discount, affordable price, CX 772 A, CX 772 C (1992)), and Dr. Eric Debbane (quality, low cost, CX 306 A, CX 306 C (1990)). *Id.* Beyond these numerous incidents, which establish

We conclude that the policies adopted and enforced by CDA evidence a horizontal restraint among its members, and therefore constitute an agreement among competitors. We turn, then, to the legality of this agreement.

#### V. Legality Of Restraints On Trade

Before we examine the specific restrictions on various types of advertising imposed by CDA, it will be useful to say a few words about the role of advertising in a competitive system. Truthful and nondeceptive advertising serves the important function of informing the consumer about "who is producing and selling what product, for what reason, and at what price." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). See generally, *AMA*, 94 F.T.C. at 1005. By apprising consumers of the "availability, nature, and prices of products and services," such advertising "performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

We believe in the basic premise, as does the Supreme Court, that by providing information advertising serves predominantly to foster and sustain competition, facilitating consumers' efforts to identify the product or provider of their choice and lowering entry barriers for new competitors. See generally, R. McAuliffe, *Advertising, Competition, and Public Policy* (1987); P. Nelson, *Advertising as Information*,

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CDA's involvement in the conspiracy to restrict members' advertising, there are hundreds of related enforcement actions by the local component societies, which exacerbates the impact of the restraints on competition. *See id.*

Contrary to the charge made in Commissioner Azcuenaga's dissent, then, our decision in this case does not rest on "a handful" of questionable actions, see, e.g., *post*, at 12, but on ample evidence of pervasive CDA enforcement. CDA stood knee deep in actions restraining the advertising of its members, and the examples noted here and in the text are intended to serve only as illustrations of that practice.

82 *Journal of Pol. Econ.* 729 (1974); J. Langenfeld and J. Morris, *Analyzing Agreements among Competitors*, 1991 *Antitrust Bulletin* 651, 667 and n.21; C. Cox and S. Foster, *The Costs and Benefits of Occupational Regulation* 29-36 (Bureau of Economics: Federal Trade Commission 1990).

Restrictions on truthful and nondeceptive price advertising, on the other hand, "increase the difficulty of discovering the lowest cost seller of acceptable ability[,] . . . [reduce] the incentive to price competitively," and "serv[e] to perpetuate the market position of established [market participants]." *Bates*, 433 U.S. at 377-78. See also *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (quoting *Bates*, 433 U.S. at 377). As a result, "where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising." *Bates*, 433 U.S. at 377. The importance of advertising, however, attaches not only to price information, but to all material aspects of the transaction. As the Court has indicated, "all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Professional Engineers*, 435 U.S. at 695.

Restrictions on broad categories of truthful and nondeceptive advertising, therefore, do place restraints on trade, and our cases have recognized as much. For example, we held in *AMA* that "[g]iven the integral function of advertising and other forms of solicitation to the workings of competition in our society" the AMA's complete ban on advertising or solicitation "has, by its very essence, significant adverse effects on competition among [its] members," and that "the nature or character of these restrictions is sufficient alone to establish their anticompetitive quality." 94 F.T.C. at 1005. Subsequently, in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549, 605 (1988), we found that "[r]estraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects." Further, we determined that the services at issue in that case were

cheaper in states that permitted certain advertising than in states that did not. *Id.* at 606 (citation omitted); see also *id.* at 563 (Initial Decision). And we have entered into a number of consent agreements with associations on the theory that consumers are harmed by restrictions on advertising of the price, quality, or convenience of professional services. See, e.g., *Association of Independent Dentists*, 100 F.T.C. 518 (1982); *Oklahoma Optometric Ass'n*, 106 F.T.C. 556 (1985); *American Inst. of Certified Public Accountants*, 113 F.T.C. 698 (1990). Since it is apparent from the record that advertising is important to consumers of dental services and plays a significant role in the market for dental services, IDF 265-67, 321, the general proposition regarding the importance of advertising to competition carries over to the instant situation.

Restraints on trade have been held unlawful under Section 1 of the Sherman Act either when they fall within the class of restraints that have been held to be unreasonable *per se*, or when they are found to be unreasonable after a case-specific application of the rule of reason. Other "restraints" have been upheld because they enhance competition or create no significant anticompetitive effect. In each situation, however, the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition. See *NCAA*, 468 U.S. at 104; *Professional Engineers*, 435 U.S. at 691.

Under the rule of reason, a challenged practice is examined in light of all the facts relevant to the particular case at hand. A court will examine the restraint in the totality of the material circumstances in which it is presented in order to assess whether it impairs competition unreasonably. Although many courts have elaborated on the details of this test, Justice Brandeis's classic formulation remains the touchstone for this rule-of-reason analysis:

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition. To determine that

question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectional regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

This enquiry need not be conducted in great depth and elaborate detail in every case, for sometimes a court may be able to determine the anticompetitive character of a restraint easily and quickly by what has come to be known as a "quick look" review. See *Indiana Federation of Dentists*, 476 U.S. at 459-61; *NCAA*, 468 U.S. at 106-10, 109 n.39.

A *per se* category of violation may emerge as courts gain familiarity with the almost invariably untoward effects of a particular practice across economic actors and circumstances. As the Court said in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982), "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Per se* categories of unlawful economic activities, in other words, consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial redeeming virtues. The general conclusion that they are illegal without further analysis of the particular circumstances under which they arise in a given case is thereby justified. See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985). Examples of such practices are horizontal price fixing, see *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940); *F.T.C. v. Superior*

*Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), territorial divisions among competitors, *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and certain group boycotts, see, e.g., *Northwest Wholesale Stationers*, *supra*. See also *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958).

When an activity falls into a *per se* category, the individual agreement or practice at issue is thought beyond justification in the sense that any argument as to the harmlessness of the restraint, or any proffer of procompetitive justifications for the practice, will generally not be considered. For example, the "reasonableness" of a fixed price will not excuse the attendant interference with the free flow of competition. *United States v. Addyston Pipe & Steel*, 85 F. 271, 291 (6th Cir. 1898) (dictum), *aff'd as modified* 175 U.S. 211 (1899); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). See also *Superior Court Trial Lawyers*, 493 U.S. at 421 ("We may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants.") Nor will a court listen to the argument that the parties lacked the necessary market power to render the agreement effectual. *Superior Court Trial Lawyers*, 493 U.S. at 430-31; *Socony-Vacuum*, 310 U.S. at 224 n.59. The *per se* approach, therefore, condemns certain agreements even in those rare instances in which they may have proved reasonable or harmless under an extended, individualized rule-of-reason analysis, but this occasional injustice is outweighed by the rule's promotion of administrative and judicial economy and its creation of clear guidelines for market actors. *Maricopa*, 457 U.S. at 344 n.16, 351 (citation omitted).

It is true that there is a converging of the *per se* category (including possible adjustments under the decision in *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979)) and a full blown rule of reason (which can take place expeditiously under a "quick look" approach) so that at times the two antitrust approaches do not differ significantly. Phillip E.

Areeda, VII Antitrust Law ¶ 1508, p. 408 (1986). Although there have been some oblique suggestions in Supreme Court cases that perhaps the categories had merged, the Court later returned to distinguishing between *per se* and rule of reason categories. See, e.g., *F.T.C. v. Superior Court Trial Lawyers*, *supra*; *Palmer v. B.R.G. of Georgia*, 498 U.S. 46 (1990) (per curiam).<sup>7</sup> We believe these separate categories continue to serve valid enforcement purposes and, in any event, authoritative Supreme Court decisions continue to recognize the distinction. We therefore turn to a discussion of the particular restraints imposed by CDA and consider the proper antitrust treatment that is to be accorded to each.

#### A. *Per Se Illegality - Restraints on Price Advertising*

Although it is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws, see e.g., *Maricopa*, 457 U.S. at 344-48; *Trenton Potteries*, 273 U.S. at 397, the price-related restrictions in this case differ from the classic price fixing conspiracy in that the agreement between CDA and its members burdens only members' advertising, as opposed to prohibiting specific sales transactions. That, however, does not save the restrictions from *per se* condemnation. CDA's restrictions on advertising "low" or "reasonable" fees, and its extensive disclosure requirement for discount advertising, effectively preclude its members from making low fee or across-the-board discount claims regardless of their truthfulness. Such a ban on significant forms of price competition is illegal *per se* regardless of the manner in

<sup>7</sup> Commissioner Starek notes in his concurrence that *Massachusetts Board of Optometry* "set out a 'structure for evaluating horizontal restraints' that is both consistent with the Supreme Court's teaching and, as the Commission observed in that case, 'more useful than the traditional use of the *per se* or rule of reason labels.'" *Post*, at 2-3 (quoting *Massachusetts Board of Optometry*, 110 F.T.C. at 603-604). Useful or not, however, we believe that it is for the Supreme Court to say whether its traditional analysis is to be abandoned. As recent cases indicate, the Court has not done so.

which it is achieved. See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

### 1. Effective Prohibition of Advertising

Section 10 of CDA's Code of Ethics prohibits advertising that is "false or misleading in any material respect," which, in turn, is defined to include any statement that is "likely to mislead because in context it makes only a partial disclosure of relevant facts" or "[r]elates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors." CDA Code of Ethics, § 10, Adv. Ops. 2(b) and (d); CX 1484-Z-49. Further Advisory Opinions provide:

"3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import.

"4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity -- for example, 'low fees' -- must be based on verifiable data substantiating the comparison or statement of relativity." *Id.*, Adv. Ops. 3 and 4; CX-1484-Z-49 to Z-50.

CDA has also separately issued detailed Advertising Guidelines, which purport to permit the advertising of "[d]iscounts on regular fees," CX 1262-D, but explain that any advertisement for discounted dental services must "list *all* of the following":

- (1) "[t]he dollar amount of the nondiscounted fee,"
- (2) "[e]ither the dollar amount of the discount fee or the percentage of the discount for the specific service,"
- (3) "[t]he length of time, if any, that the discount will be offered."

- (4) "[v]erifiable fees", and
- (5) "[s]pecific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." CX-1262-I (emphasis in original).

Although this may sound like an innocuous regulation that does no more than enhance the truthfulness of the information conveyed, in its enforcement CDA effectively precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts.

The silencing effect of CDA's enforcement of the restrictions on advertising of low fees is evident from the record. For example, respondent recommended denial of membership to one dentist because he advertised, among other things, references to "cost that is reasonable," "affordable, quality dental care," "making teeth cleaning . . . inexpensive," and "very reasonable rates," which were objectionable because "fee advertising must be exact." See CX 301-B to D. Although CDA ostensibly changed course in 1991 (based on a rediscovered decision of the Judicial Council in 1978 which had approved use of the phrase "reasonable fees"), this alleged retraction does not appear to have been communicated to CDA's components nor did it terminate CDA's practice of citing members for use of that term. See IDF 255-57; CX 391; CX 778. Thus, on November 4, 1993, CDA recommended denial of membership to a dentist because, among other things, his employer's advertising included the offers "reasonable fees quoted in advance" and "major savings," and in respondent's view "the above referenced phrases are misleading and would cause an ordinarily prudent person to misunderstand or be deceived." CX 118-B. As occurred frequently in CDA's enforcement actions, the citation gives no indication that the conclusion regarding the misleading nature of the phrases was based upon an allegation that the advertising claim was false or that the advertising dentist lacked a

reasonable basis for the fee representations made. See also T. 361-78 (Dr. Miley).<sup>8</sup>

CDA's discount disclosure standards turns out to have been equally prohibitive. The Supreme Court's warning that "[r]equiring too much information in advertisements can have the paradoxical effect of stifling the information that consumers receive," *Morales*, 504 U.S. at 388 (quoting letter from FTC to Christopher Ames, Deputy Attorney General of California, dated Mar. 11, 1988), applies in this case. As even a member of CDA's Judicial Council, Dr. Kinney, acknowledged at trial, across-the-board discount advertising in literal compliance with the requirements "would probably take two pages in the telephone book" and "[n]obody is going to really advertise in that fashion." T. 1372. Although dentists can comply with the disclosure requirement when advertising a discount for a small number of services, the record bears out the conclusion that dentists do not advertise across-the-board discounts that include a complete itemization of the regular fee for each discounted service. See, e.g., Appendix to Brief for Respondent; IDF 179. Dr. Kinney purported to agree that "if they are offering a discount to senior citizens and this is an across the board discount for everything . . . you would have to be a little flexible and . . . not . . . require that . . . every single fee [be listed]," T. 1373, but CDA did not ever compromise its demand for full compliance with the panoply of disclosures. For example, it recommended denial of membership to one dentist because she advertised, among other things, "20% off new patients with this ad" without including the dollar amount of the nondiscounted fee for each service. See CX 206-A; T. 1063-65. Another was advised that his advertisement of "25% discount for new patients on exam x-ray & cleaning/ 1 coupon per patient/ offer expires 1-30-94/ not good with any other offer" was unacceptable

<sup>8</sup> See FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 648, 839 (1984) (appended to *Thompson Medical Co., Inc.*) (advertisers must have "a reasonable basis for advertising claims before they are disseminated"). Cf. *Infra* note 25.

since it did not include the customary fee. CX 843-44. A third was admonished for having offered a "10% senior citizen discount" without the disclosures required by respondent. See CX 585-A, 586-E, 588-B.

Thus, regardless of the formal codification of its policy, CDA in fact imposed a broad ban on these forms of price advertising by its members.

## 2. *Per Se* Illegality

This effective prohibition on truthful and nondeceptive advertising of low fees and across-the-board discounts constitutes a naked attempt to eliminate price competition and must be judged unlawful *per se*. That it does so by the indirect means of suppressing advertising does not change that result. Nor is it of consequence that we are faced with a restriction among professionals.

Conspiracies to eliminate price competition come in various forms. For example, in *Socony-Vacuum*, *supra*, the Supreme Court struck down as *per se* unlawful an agreement among competing oil companies to purchase large amounts of gasoline on the spot market and store it for later sale in an effort to stabilize prices. In *United States v. General Motors Corp.*, 384 U.S. 127, 145-47 (1966), the Court examined concerted activity aimed at preventing discounters from doing business with car dealers and found this practice also to be a *per se* violation of the Sherman Act. And *Catalano*, 446 U.S. 643, held that an agreement among wholesalers to eliminate short-term credit formerly granted to retailers made out a *per se* violation as well. More recently, in *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217 (7th Cir. 1993), the Seventh Circuit held an association of marine dealers to have engaged in a *per se* violation of the Act when it refused to admit a dealer to its annual boat show because of that dealer's publicized policy to "meet or beat" competitors' prices at the shows. And in *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), another case invoking *per se* analysis, the Seventh Circuit held that an agreement

among competitors not to advertise in specified territories was tantamount to an outright allocation of markets and thus illegal *per se*. "To fit under the *per se* rule," the court reasoned, "an agreement need not foreclose all possible avenues of competition." *Id.* at 827. The restrictions on advertising sufficed to bring the agreement under the rule.

Indeed, in *AMA*, we had already noted that "restraints on the advertising of prices have previously been considered *per se* illegal by some courts." 94 F.T.C. at 1003 (citing *United States v. Gasoline Retailers Ass'n, Inc.*, 285 F.2d 688 (7th Cir. 1961), and *United States v. House of Seagram, Inc.*, 1965 Trade Cas. (CCH) ¶ 71,517 (S.D. Fla. 1965)). In the cited Seventh Circuit decision, the court had reviewed a horizontal agreement among gasoline retailers to refrain from advertising or giving premiums, and from advertising the price of their product in locations other than the gasoline pumps, and the court declared this conspiracy to be a *per se* violation of the Sherman Act. 285 F.2d at 691. Although the agreement was thus coupled with outright price maintenance, the conspiracy in restraint of advertising was no less singled out for *per se* condemnation. *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960), is also instructive. In that case, the Court held that Parke Davis had gone beyond the limits of permissible vertical arrangements by enlisting wholesalers in a conspiracy to deny its products to retailers who sold below the suggested minimum retail price. This conspiracy, which had a distinctive horizontal flavor, was illegal under the Sherman Act. *Id.* at 45-46. Important for our purposes is that the Court went on to address how Parke Davis had similarly brokered a horizontal agreement among retailers to suspend advertising of discounts, concluding that these actions were directed at creating a *per se* unlawful agreement to eliminate price competition. *Id.* at 46-47. Applying *Parke Davis*, the District Court in *Seagram* expressly held that horizontal "[a]greements by retailers . . . to discontinue advertising . . . are tantamount to agreements not to compete and constitute *per se* violations . . . of Section 1 of the Sherman Act." 1965 Trade Cas. (CCH) ¶ 71,517 at p. 81,275. Finally, the Seventh Circuit confirmed the view

that a prohibition on advertising discounts "is functionally a price restriction," *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 724 (7th Cir. 1986), and refrained from applying the *per se* rule only because, as the court noted in a subsequent appeal in that case, "the *per se* rule against this practice does not apply when the vendor is an agent," 889 F.2d 751, 752 (1989), *cert. denied*, 495 U.S. 919 (1990).<sup>9</sup>

Horizontal agreements suppressing broad categories of truthful and nondeceptive price advertising, then, effectively suspend a significant form of price competition. Indeed, such an agreement to eliminate price advertising can be more threatening to competition than a ban on discount sales, since, as Judge Easterbrook noted in *Illinois Corporate Travel*, a "no-advertising rule . . . is easily enforceable because advertising of discounts is observable." 806 F.2d at 727.

The professional context of this restraint does not lead to a different conclusion. In *AMA*, we ultimately refrained from classifying the price advertising restraints as *per se* illegal largely due to our hesitation to speak categorically about restrictions by professional associations, which at the time had "not previously been subject to extensive scrutiny under the antitrust laws." 94 F.T.C. at 1003. See also *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) ("We do not know enough of the economic and business stuff out of which these arrangements emerge to . . . decide whether they . . . should be classified as *per se* violations."); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n.17 (1975) ("It

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<sup>9</sup> In a case in which automobile dealers conspired to oppose invoice advertising (which is advertising the price as a fixed percentage or sum above the dealer's invoice), the Justice Department recently reached the conclusion that "an agreement by a trade association or its members not to engage in certain types of advertising is a *per se* violation of the antitrust laws." Competitive Impact Statement regarding proposed Final Judgment in *United States v. National Automobile Dealers Ass'n*, Civ. Action No. 95-1804 (D.D.C. filed Sep. 20, 1995) at 6, reprinted in 60 Fed. Reg. 51,491, 51,498 (Oct. 2, 1995).

would be unrealistic to view the practice of professions as interchangeable with other business activities."). The Supreme Court had just decided *Professional Engineers* under a truncated analysis, but without expressly declaring that it was subjecting the association's prohibition against competitive bidding to *per se* treatment. Since then, however, it has become clear that the Court in that case did essentially apply a *per se* rule to the agreement. See *Catalano*, 446 U.S. 643; *In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457, 471 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 461 (1992); *Michigan State Medical Society*, 101 F.T.C. at 290.<sup>10</sup> And both the Commission and the courts have in

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<sup>10</sup>Although in *Professional Engineers* the Supreme Court did not expressly identify the approach it used as *per se*, this now appears to have been merely a matter of terminology, rather than analytical significance. The Court's opinion in *Professional Engineers* placed both the abbreviated, categorical approach as well as the individualized, contextual examination under the umbrella label "rule of reason." See 435 U.S. at 691-692. It explained that the first applies to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality — they are 'illegal *per se*,'" whereas the second encompasses "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *Id.* at 692. It then termed the ban on competitive bidding "illegal on its face," noting that "[w]hile this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* Finally, it noted: "Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But the Society's argument in this case is a far cry from such a position." *Id.* at 696.

Since that case, the Court has returned to applying the label "rule of reason" to the second approach only, as a means to distinguish it from the *per se* category. Although the Court has at times quoted from *Professional Engineers* as though the case had applied the individualized rule of reason, see, e.g., *Indiana Federation of Dentists*, 476 U.S. at 459, the Court has elsewhere indicated that the approach it used in *Professional Engineers* was indeed what we generally would term *per se*, see *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). We use the term "rule of reason" when speaking about the individualized analysis, in contradistinction to the categorical, *per se* approach.

the interim gained considerable exposure to anticompetitive activities by professional associations.<sup>11</sup>

To be sure, the "public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Maricopa*, 457 U.S. at 348-49 (quoting *Goldfarb*, 421 U.S. at 788 n.17). By the same token, however, in cases involving agreements not "premised on public service or ethical norms," the Supreme Court has repeatedly applied the *per se* rule. *Id.* at 349. Cf. *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983) ("an agreement to fix prices will not escape *per se* treatment simply because it is entered into by professionals and accompanied by ethical protestations [, whereas] . . . a canon of medical ethics purporting, surely not frivolously, to address the importance of scientific method gives rise to questions of sufficient delicacy and novelty at least to escape *per se* treatment"), *cert. denied*, 467 U.S. 1210 (1984). Recently, for example, in *Superior Court Trial Lawyers*, the Court had no trouble deciding that *per se* treatment was called for when lawyers entered into a horizontal agreement to fix prices, the professional context notwithstanding. 493 U.S. 411. Furthermore, our own decision in *Michigan State Medical Society*, which purportedly refrained from applying the *per se* rule, nonetheless noted that the *per se* standard can apply in the

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<sup>11</sup>See, e.g. *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Wilk v. American Medical Ass'n*, 895 F.2d 352 (7th Cir. 1990), *cert. denied*, 496 U.S. 927 (1990); *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988); *Michigan State Medical Society*, 101 F.T.C. 191 (1983); *National Ass'n of Social Workers*, 58 Fed. Reg. 17,411 (April 2, 1993) (consent order issued March 3, 1993); *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued Dec. 16, 1992); *American Inst. of Certified Public Accountants*, 113 F.T.C. 698 (1990) (consent); *Oklahoma Optometric Ass'n*, 106 F.T.C. 556 (1985) (consent); *Association of Independent Dentists*, 100 F.T.C. 518 (1982) (consent).

professional setting even where the conspiracy does not set specific prices or fees. 101 F.T.C. at 290. And in *Massachusetts Board of Optometry* we found that even in the context of professional rules, restraints on truthful advertising "are inherently likely to produce anticompetitive effects," and that a ban on discount advertising for professional services impedes new entry and the efficient use of resources by eliminating a form of price competition. 110 F.T.C. at 605. In that case we summarily condemned the price advertising restraints. *Id.* at 607.<sup>12</sup> We therefore believe it to be well grounded in this experience and in precedent to strip CDA's price advertising restrictions of their professional garb and declare them *per se* unlawful as naked restraints on price competition.

The examination of a practice, however, does not inevitably come to rest after it has been identified as falling into the category of *per se* unlawful bans on price competition. Under *Broadcast Music*, 441 U.S. 1, and *NCAA*, 468 U.S. 85, respondent might attempt to argue that its practice is a restraint on price competition "in only a literal sense." *Maricopa*, 457 U.S. at 355. Arguments that might carry weight under *Broadcast Music*'s characterization approach, however, have not been advanced here.<sup>13</sup>

<sup>12</sup>Cf. *Detroit Auto Dealers*, 955 F.2d at 470-71 ("We believe that the inherently suspect conclusion arises from a *per se* approach by the Commission . . .").

<sup>13</sup>We agree with Commissioner Starek that it would be a grave error to chart a course on which "potential competitive benefits of agreements restricting price advertising need never trouble the Commission again." *Post*, at 2. The *per se* rule as articulated in recent cases by the Supreme Court and as applied by the Commission today, however, runs no such risk. To the contrary, we have been open to arguments that might carry weight under *Broadcast Music*, but CDA has simply failed to assert the requisite competitive benefits that might save it from *per se* condemnation. Commissioner Starek certainly is not suggesting that significant, pro-competitive benefits have been overlooked in this case. The view that the Commission's reasoning foreshadows summary condemnation for a vast array of future cases, see, e. g., *post* at 2, 7, therefore, overstates our conclusion here. Only cases involving equivalent conduct will be accorded similar treatment in the future.

Respondent urges only in the most general sense that its restrictions are procompetitive in that they are intended to protect consumers from unfair and deceptive advertising. But respondent has entirely failed to explain why it is unfair or deceptive to advertise an across-the-board discount without disclosure on the face of the advertisement of the regular fee of each service covered by the discount, or how consumers are harmed by an advertisement that announces with a reasonable basis for its truthfulness (let alone truthfully) that the prices charged are low as compared to other providers in the area.

CDA's restraints on price advertising are thus illegal *per se*. In the course of discussing the nonprice advertising restraints under the rule of reason in the next section, however, we will also reexamine the restraints on price advertising under that more elaborate analysis, but solely as a means of demonstrating that, assuming *arguendo* the restraints had escaped censure under the *per se* approach, they would nonetheless have been condemned under the rule of reason.

#### B. Rule of Reason -- Restraints on Price & Non-Price Advertising

Unlike price advertising restraints, which have in one form or another received ample consideration by the courts and fit squarely within the Sherman Act's core prohibition against the collusive suspension of price competition, CDA's restrictions on nonprice advertising are entitled to an examination under the rule of reason. With regard to these restraints, we cannot say with equal confidence that, as a facial matter, CDA's concerns are unrelated to the public service aspect of its profession, or that "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music*, 441 U.S. at 19-20. Thus, mindful of the Court's general reluctance to adopt a *per se* approach in reviewing codes of conduct of professional associations, and heeding the Court's admonition not to expand the *per se* category "until the

judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged," *Maricopa*, 457 U.S. at 349 n.19, we refrain from extending *per se* treatment to the restrictions on nonprice advertising and apply the default, rule-of-reason analysis instead.<sup>14</sup>

The Supreme Court has made clear that the rule of reason contemplates a flexible enquiry, examining a challenged restraint in the detail necessary to understand its competitive effect. See, e.g., *NCAA*, 468 U.S. 103-110. As will be seen, here, application of the rule of reason is simple and short. The anticompetitive effects of CDA's advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion, and, in any event, CDA clearly had sufficient power to inflict competitive harm.

### 1. The Likely Anticompetitive Effects of the Restraints

Although the ALJ did not examine the effects of CDA's rules in as much detail as he might have, the record demonstrates that each of the restraints, not only those on price advertising, has anticompetitive effects. The nonprice advertising CDA proscribes is vast. In addition to making general prohibitions against false or deceptive advertising, CDA forbids quality claims. Advisory Opinion 8 to Section 10 of CDA's Code of Ethics urges against quality claims:

"Advertising claims as to the quality of services are not susceptible to measurement or verification;

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<sup>14</sup>We do not decide, however, whether, as a general matter, restrictions on nonprice advertising will always escape condemnation under the *per se* rule of illegality.

accordingly, such claims are likely to be false or misleading." CX 1484-Z-50.<sup>15</sup>

In practice, CDA prohibits all quality claims. For example, CDA recommended denial of membership to one dentist because her advertising included the phrase "quality dentistry," which CDA maintained was not susceptible of verification, CX 387-C, recommended denial of membership to another because he included in his advertising the phrase "we are dedicated to maintaining the highest quality of endodontic care," which CDA cited as being unverifiable, CX 1083-C, and initially denied membership to yet another dentist because his advertisement of "improved results with the latest techniques" and "latest in cosmetic dentistry," was allegedly likely to create false or unjustified expectations of favorable results as to the quality of service and was not subject to verification, CX-306.

Furthermore, albeit without coextensive written regulations, CDA suppresses claims of superiority and the issuance of guarantees.<sup>16</sup> For example, in 1993, when a dentist reapplied for membership, CDA recommended that he be counseled regarding his advertising because of a representation of superiority, i.e., the claim that "all of our handpieces (drills) are individually autoclaved for each and every patient." See CX 671-A. CDA also routinely cited applicants or members for implying superiority by use of the phrase "state of art," as in one dentist's advertisement of "state-of-art sterilization," CX 43-B. See also, e.g., CX 1026-A ("state of the art dental services"); CX 394-B ("highest standards in sterilization"). In 1992, CDA found an advertisement containing the phrase "we can provide the

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<sup>15</sup>Cf. CDA Code of Ethics, § 10, CX 1484-Z-49 (prohibiting advertising that is "false or misleading in any material respect").

<sup>16</sup>CDA does have a provision that may be read to address superiority claims, i.e. Section 22 of its Code of Ethics which provides that "[t]he dentist has the further obligation of not holding out as exclusive any agent, method or technique," CX 1484-Z-53. CDA's enforcement record, however, reveals a complete prohibition of superiority claims.

uncompromised standards of excellence you demand" to be an impermissible representation of superiority. CX 354. With respect to guarantees, CDA prohibited such claims as "we guarantee all dental work for 1 year," CX 668-C; CX 557-C, or "crowns and bridges that last," CX 497-C.

CDA has also, on occasion, imposed special burdens on dentists claiming that they offer "gentle" care, CX 70-A, although its activities on that score appear to be less sweeping in recent years than those of CDA's component societies. See IDF 208-15. And finally, CDA passed a resolution in 1984 (to which the organization still adheres today), providing:

"[I]t is the position of the Judicial Council that solicitation of school children on any private or public school ground(s) is deemed not to elevate the esteem of the dental profession." CX 1115-A.<sup>17</sup>

In the course of enforcing that policy statement, CDA informed a component in 1993 that when dentists participate in school screenings and include their name and address on the screening document sent home to the parents, such activity "can be construed to be a form of [prohibited] solicitation . . ." CX 1167-A.

In addition to the finding in earlier cases regarding the anticompetitive effects of broad restrictions on the truthful and nondeceptive advertising of a service, see, *supra*, discussion at the beginning of Part V, in this case there is substantial evidence that the restrictions imposed by CDA prevented the dissemination of information important to consumers and the advertising of aspects of a dental practice that form a significant basis of competition among California's dentists. For example, the ALJ found that information not only about price of service, but also about

<sup>17</sup>Cf. CDA Code of Ethics, § 10, CX 1484-Z-49 ("In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public.").

quality and sensitivity to fears is important to consumers and determines, in part, a patient's selection of a particular dentist. IDF 265-67. He also credited the testimony of the owner of an advertising agency that specializes in serving dental practices, who testified that advertising the comfort of services will "absolutely" bring in more patients, and that, conversely, restraints on advertising of the quality or discount of dental services would decrease the number of patients a dentist could attract. IDF 265. In one case, the elimination of the phrase "gentle dentistry in a caring environment" meant sacrificing an advertisement that had attracted 300 new patients within six months. IDF 286. The ALJ also found that the prohibition on distributing identifying information during school screenings resulted in a loss of potential customers. IDF 302.<sup>18</sup>

The importance to consumers of advertising of various characteristics of dental services is confirmed by other witnesses as well. For example, Dr. Richard Harder, who closely monitored the results of his various advertising techniques, testified that generic advertising without comparative quality or price claims was rather ineffective, attracting only 15-20 new patients a month, but that a subsequent campaign based on advertising a special fee for new patients, as well as a dedication to quality of service and family dentistry, brought in between 75 and 100 new patients a month. After being contacted by the local society and threatened with discipline, Dr. Harder eliminated all references to quality and family, which contributed to an observed reduction in the number of new patients coming into his practice. T. 262-74. Dr. John Miley's practice experienced a similar surge in new customers through

<sup>18</sup>The manner in which CDA impairs new entry of competitors is particularly well illustrated by price advertising restraints, such as citations for advertising "Grand Opening Special \$5 exam x-ray, \$15 polishing and 40% off dental treatment," CX 828-D, "as a get acquainted offer, an initial consultation, complete exam, any x-rays and tooth cleaning will be done for only \$5 (applies to all members of your family)," CX 657, and "we guarantee all dental work for 1 year," CX 668-C.

advertising that included references to the quality and superiority of his services, as well as to the fact that he offered discounts and low prices. T. 316-457; CX 723.

As is therefore evident from the record, the restraints hamper dentists in their ability to attract patients to their practice and thereby are likely to reduce output. More important for our purposes, the restrictions thus deprive consumers of information they value and of healthy competition for their patronage. Even without quantifying the increase in price or reduction in output occasioned by these restraints, we find the anticompetitive nature of these restraints to be plain. See *AMA*, 94 F.T.C. at 1006.

## 2. Market Power

Although the ALJ found that the suppression of advertising "has injured those consumers who rely on advertising to choose dentists," he spelled out a second conclusion, rather in tension with the first, that CDA lacked market power. ID at 76. The ALJ concluded that complaint counsel had failed to establish the relevant product and geographic markets, and decided, on the ground that there was no "insurmountable obstacle to entry" into the dental market, that "CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local." ID at 76. We reject that conclusion.

Market power is part of a rule of reason analysis, but it is important to remember why market power is examined.<sup>19</sup> We consider market power to help inform our understanding of the competitive effect of a restraint. Where the consequences of a restraint are ambiguous, or where substantial efficiencies flow from a restraint, a more detailed examination of market power may be needed. Here, in

<sup>19</sup>The Supreme Court has indicated that when a court finds actual anticompetitive effects, no detailed examination of market power is necessary to judge the practice unlawful. See *NCAA*, 468 U.S. at 109-10; *Indiana Federation of Dentists*, 476 U.S. at 461.

contrast, the ALJ found, and we agree, that the suppression of advertising "has injured those consumers who rely on advertising to choose dentists" (the record indicates that significant numbers of such consumers indeed exist), and none of the practices can rely for support on a valid efficiency justification. To the extent that market power is relevant, it suffices that the association has the power to withhold from consumers the relevant information that they seek.<sup>20</sup> And as we shall explain presently in further detail, CDA has the ability to identify violators of the agreement and the necessary market power to enforce this ban over sufficiently large segments of the market to deprive consumers of valuable information.

When examining the market power of an association's restriction on members who are the primary economic actors, we confront two closely related questions. First, whether viewed as a question of market power or of the existence of an agreement, we must determine whether the association

<sup>20</sup>In *Indiana Federation of Dentists*, 476 U.S. at 459, the Court examined "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire," and concluded:

"While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.' *National Society of Professional Engineers*, *supra*, at 692. A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue — such as, for example, the creation of efficiencies . . . such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place,' *National Society of Professional Engineers*, *supra*, at 692, cannot be sustained under the Rule of Reason."

has the ability successfully to impose the restriction on its members. If the association is unable to gain its members' adherence to the rule such that the market continues to function as it had before, the restraint will become an irrelevant formality of little concern to antitrust regulators. If, however, the association is able to induce its current members to follow the rule, and is not reduced significantly by attrition, we must turn to the second question, which asks whether the association has the necessary power to cause harm to consumers by imposing the rule on its members. For if alternative sources for the service offered by the association's members are so prevalent as to permit consumers easily to switch to providers who are unfettered by the rule, even a well-enforced restraint should cause no harm to the efficient functioning of the market. Members will simply lose business, nonmembers' business will surge, and the market will eventually cure itself. If, on the other hand, consumers' abilities to turn elsewhere are limited, the association is in a position to harm consumers by adopting restrictive rules. This turns out to be the case here.

There is little doubt that CDA has the ability to police, and entice its members to adhere to, the restrictions on advertising. Unlike an individual sales transaction, advertising is a public, conspicuous event that is easily monitored. Cf. *Illinois Corporate Travel*, 806 F.2d at 727 (finding no-advertising rule "easily enforceable" because advertising "is observable"). Many components review the Yellow Pages phone listings at the behest of CDA, IDF 146, and CDA investigates complaints about dentists' advertising. There is no evidence in the record of rampant advertising that has failed to come to CDA's attention. Next, it is clear that dentists place a high value on the benefits of membership in CDA, whether because of its insurance and educational programs or the reputational advantage that membership may confer. IDF 268-74; see also, e.g., T. 376-92. We need not quantify this benefit econometrically, since in this case the record speaks for itself. When faced with a choice between membership and advertising, dentists overwhelmingly choose the former. Several component

Ethics Committee officials testified that their members were in perfect or near-perfect compliance with the advertising code and that they knew of not a single instance in which a member dentist had refused to modify or discontinue the challenged advertising. IDF 275-86. Numerous applicants had, of course, already changed their advertising in order to gain admission to CDA in the first place. See, e.g., CX 670-71, CX 365-66, CX 249.<sup>21</sup> Moreover, this stranglehold on the profession extends well beyond actual members to include employers, employees, and business referral services of members, since these are equally prohibited by CDA from engaging in advertising that violates CDA's Code of Ethics (whenever such advertising indirectly benefits the member). IDF 287-93; see CX 1358-B.

Here, this kind of power goes hand in glove with the second, that is the ability successfully to withhold information from consumers. Without much theoretical analysis, it can be readily concluded from the record,

<sup>21</sup> Quite contrary to Commissioner Azcuenaga's suggestion that "it seems questionable to infer that dentists feared the CDA instead of the state of California," *post*, at 27, the record bears out just that. For example, Dr. Jenkins's capitulation when he "disagree[d] with [CDA's] findings" but decided to "disagree agreeably" and promise that "[t]he statements in question will no longer be used in any mailings from this office," CX 480, evidences that it was this dentist's desire to become a member of CDA, not a concern about state law, that drove him to comply with CDA's Code of Ethics. Similarly, Dr. Foroosh's seven-year battle for admission to CDA, CX 360-366, was clearly motivated by a desire to gain admission to the Association, not to seek continual guidance from CDA about state law. See also CX 302-398 (Dr. Eric Debbane, gaining membership with fourth application). Indeed, two dentists who had apparently cleared their advertisement with the Board of Dental Examiners, nonetheless eliminated all references to "uncompromised standards or outstanding success rates" after they were contacted by respondent and informed that respondent is a separate entity from the Board. CX 355, 357, 358. The record thus contains ample confirmation of the importance of membership and its power to compel the alteration of dentists' advertising practices. See also, e.g., IDF 285 (disagreement with CDA's conclusion but promise to cure advertising); IDF 268-274 (members' statements regarding value of membership).

common sense, and the California Business and Professions Code that the services offered by licensed dentists have few close substitutes and that the market for such services is a local one. See Cal. Bus. & Prof. Code §§ 1625-1626 (defining dental services that can be performed only by licensed dentists); T. 637 & 655 (Christensen) (testifying that dental market is local); see also *Indiana Federation of Dentists*, 476 U.S. at 461 (noting that "markets for dental services tend to be relatively localized"). Even respondent's expert witness agreed that the provision of dental services "could be" a relevant product market, see T. 1689 (Prof. Knox), and his view on the relevant geographic market was that California consists of numerous markets, each "smaller than the [entire] State," since "dental services are bought and sold . . . in a more disaggregated market," T. 1642 (Prof. Knox). CDA commands more than a substantial share of these markets. Around 75 percent of the practicing dentists in California belong to CDA, IDF 2, and, according to one component society, the figure exceeds 90 percent in at least one region, CX 1433. Given CDA's success in enforcing its rules, and the extended reach of its prohibition to various associates of member dentists, we can only assume that even these numbers understate CDA's real market share.

While market share alone might not always be a sufficient indicator of market power, it may nonetheless be relied upon at least where there are significant barriers to entry. For example, in *Michigan State Medical Society*, 101 F.T.C. at 292 n.29, we explained that "there is little need for an elaborate market definition analysis in this case, since MSMS' members account for roughly 80% of the physicians in Michigan." We concluded in that case that, as a result, "no matter how the relevant product or geographic markets might be characterized, the potential impact of the agreements in question is substantial." *Id.* The Seventh Circuit has similarly indicated that reliance on market share can be appropriate, and is "especially so where there are barriers to entry and no substitutes from the consumer's perspective." *Wilk v. American Medical Ass'n*, 895 F.2d 352, 360 (7th Cir.), cert. denied, 496 U.S. 927 (1990) (citation

omitted). In addition to the absence of substitutes, however, in the present case there are entry barriers as well.

Barriers to entry figure prominently in California's market for dental services. As an initial matter, we note that it has never been held, as the ALJ appears to believe, that barriers to entry are cognizable in antitrust analysis only when they are "insurmountable," IDF at 76, or, as respondent's expert witness thought, only if they are created by the association accused of engaging in anticompetitive practices, IDF 322. And we disagree with respondent's expert witness that costs incurred to enter the market are irrelevant whenever similar costs were borne by current market participants when they first entered the market. See T. 1636-1640.<sup>22</sup>

In our view, the record bears out the conclusion that entry into the California dental market is difficult. In addition to facing the substantial educational requirements, which according to one witness leave students coming out of dental school with between \$50,000 and \$100,000 of debt, a dentist who seeks to establish a practice must either lease or purchase the necessary space and equipment and hire appropriate personnel, or must purchase an existing practice (the costs of which according to one witness range between \$75,000 and \$100,000). After setting up the practice, and provided a dentist is able to attract a sufficient clientele, it can take from 18 months to 2 years for a practice to meet current expenses, and between 5 and 10 years to amortize the debt. See IDF 329-31; T. 297-300 (Dr. Harder); T. 329-31 (Dr. Miley); T. 756-64 (Dr. Hamann). Thus, new entry into the dental profession in California is difficult. And given these startup costs, a good deal of which even an active dentist who seeks to relocate to California would face, the idea that fully licensed dentists from other states would move in significant numbers to California to take advantage of the

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<sup>22</sup> A combination of these three beliefs led the ALJ to credit the testimony by respondent's expert witness that CDA's activities had "no impact on competition in any market in the State of California." IDF 322, 326. As indicated in the text, we reject that conclusion.

opportunity to advertise in competition with members of CDA is implausible at best.

Even easy entry at the level of opening a dental practice would not necessarily mean that the Association could not exercise market power. If the Association membership confers a real economic benefit that cannot be easily replicated, then exclusion from the Association may impose a real economic cost on potential entrants. Here, CDA membership entails significant benefits for the dentist as demonstrated by the fact that no one gives up membership in order to gain the freedom to advertise -- including those inclined to advertise but directed not to by CDA.

We therefore conclude that CDA possesses the necessary market power to impose the costs of its anticompetitive restrictions on California consumers of dental services.

### 3. Efficiencies

As the third step in our quick look, we examine the efficiency justifications proffered by respondent together with any others that might be raised in support of CDA's restraints on advertising. Respondent contends that insofar as its advertising restraints are not harmless, they are procompetitive because CDA challenges only advertising that is false or misleading. Although the prevention of false and misleading advertising is indeed a laudable purpose, the record will not support the claim that CDA's actions are limited to advancing that goal.

Under Section 5 of the FTC Act, an advertisement is deceptive "if it is likely to mislead consumers acting reasonably under the circumstances in a material respect." *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 314 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993) (citation omitted); see also *Southwest Sunsites Inc. v. F.T.C.*, 785 F.2d 1431, 1435-36 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986); *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). A

practice is not considered "unfair" under the Act unless it engenders substantial consumer injury that is not reasonably avoidable by the consumer and not outweighed by countervailing benefits to consumers or competition. See FTC Act Amendments of 1994, § 9, 108 Stat. 1691, 1695, to be codified at 15 U.S.C. § 45; Letter from FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation (Dec. 17, 1980), *reprinted* in Appendix to *International Harvester Co.*, 104 F.T.C. 1070 (1984). Without a significant additional proffer, which CDA has not made, the types of advertising claims categorically prohibited by CDA's stated policies and enforcement efforts could not reasonably be thought to be either deceptive or unfair under Section 5.

First, CDA prohibits even truthful offers of discounts by dentists unless the advertisement states the regular price of the discounted service. Where the discount applies to numerous services (for example, a senior citizens discount on all services), the practical effect of this requirement has been to forbid the advertising entirely. However, the truthful offer of a discount from the price ordinarily charged by a dentist for services is not deceptive. The offer of a discount can, of course, be misleading if the advertiser selectively inflates the price from which the discount is computed or offers "discounts" to everyone from a fictitious "regular" price. See, e.g., *Encyclopedia Britannica, Inc.*, 100 F.T.C. 500, 505 (1982) (order modifying consent order); *Diener's, Inc.*, 81 F.T.C. 945, 976-78, 980-81 (1972), *modified*, 494 F.2d 1132 (D.C. Cir. 1974); *Paul Bruseloff*, 82 F.T.C. 1090, 1095-96 (1973) (consent). But there is no suggestion here that CDA merely prohibited discount claims by dentists found individually to have engaged in such chicanery, or that CDA had evidence of significant abuse of discount claims that might provide support for a prophylactic ban. Instead, CDA effectively prohibited across-the-board discount offers,

whether truthful or not. No purported policy of preventing deception can justify that approach.<sup>23</sup>

Similarly, the law of deception does not prohibit broadly all representations that a seller's prices are "low" or a "bargain" in relation to others, and certainly not where the representations are accurate or can be substantiated. See *Tashof v. F.T.C.*, 437 F.2d 707, 710-11 (D.C. Cir. 1970) (comparing discount offers to prevailing prices). Once again, CDA's policy is to condemn categorically all representations regarding "low" or "affordable" prices, without any enquiry as to how those terms might be construed by consumers and whether, as construed, they are true of the particular practitioner making the claim.

CDA's condemnation of guarantees is likewise overbroad. While a guarantee of a specified medical outcome may well be misleading, a truthful promise to refund money (or to honor scheduled appointments) is certainly not. Commission guidelines identify the obligations of those who advertise guarantees. See Guides for the Advertising of Warranties and Guarantees, 16 C.F.R. Part 239 (1985). Barring some information that an advertiser has misrepresented or failed to honor a guarantee, such advertising cannot presumptively be condemned as deceptive.

In the same vein, CDA's broad prohibition on claims relating to the absolute or comparative quality of service finds no support in the law governing deception. Some

<sup>23</sup> CDA suggests that its approach to discount advertising may be justified by reference to the Supreme Court's stated preference for "more disclosure, not less" in dealing with the regulation of deceptive speech under the First Amendment. Brief for Respondent 37-38 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977)). But the Court has expressed its preference for affirmative disclosures only as an alternative to prohibiting otherwise deceptive speech. Moreover, where, as here, speech is truthful and not misleading, the Supreme Court has shown great skepticism towards disclosure mandates that so burden the speech as to preclude it. See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 389-90 (1992).

general claims of quality, of course, are so recognizably statements of personal opinion that no substantiation is either possible or expected by reasonable consumers. Such "mere puffing" deceives no one and has never been subject to regulation. See Federal Trade Commission Policy Statement on Deception, 103 F.T.C. 174, 181 (1984) (appended to *Cliffdale Associates*); *Bristol-Myers Co.*, 102 F.T.C. 21,321 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

Respondent refers to the Supreme Court's suggestion in *Bates*, 433 U.S. at 383-84, that "'advertising claims as to the quality of [legal] services . . . are not susceptible of measurement or verification; accordingly such claims may be so likely to be misleading as to warrant restriction.'" Brief for Respondent 44 (quoting *Bates, supra*). We do not understand this language, however, to justify broad categorical prohibitions on quality claims of all sorts, without some effort to determine their accuracy or effect upon consumers. As the Court has more recently observed:

"Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985)).

Insofar as claims of absolute or comparative professional quality (including claims made to alleviate patient anxiety) do implicate objective standards for which consumers would reasonably expect an advertiser to have proof, they may, of course, be proscribed upon a showing that particular claims are false or unsubstantiated. In our view, the requisite showing requires proof that specified claims are untrue or that advertisers lack "a reasonable basis for advertising

claims before they are disseminated." FTC Policy Statement regarding Advertising Substantiation, 104 F.T.C. 648, 839 (1983) (appended to *Thompson Medical Co., Inc.*). Likewise, even assuming *arguendo* that claims of quality and efficacy may so readily be equated with claims of superiority as many of CDA's interpretations appear to suggest, see IDF 194-204, the Commission "evaluates comparative advertising in the same manner as it evaluates all other advertising techniques," and "industry codes and interpretations that impose a higher standard of substantiation for comparative claims than for unilateral claims are inappropriate." Statement in Regard to Comparative Advertising, 16 C.F.R. § 14.15(c) (2).

Departing from its deception rationale, CDA seeks to justify its prohibition against dentists' provision of identifying information in school screening programs as a means of preventing exploitation of youthful consumers. This defense is inapt. While efforts to exploit youthful consumers and other particularly vulnerable groups have been challenged and condemned as deceptive and unfair in a variety of contexts,<sup>24</sup> that rationale is misplaced here, given that the only apparent commercial effect of furnishing the prohibited identifying information to children could be to provide their parents with the means of contacting the dentist.

We do not mean to deny that advertising that would otherwise be permissible might be harmful in the context of promoting dental services. See, e.g., *AMA*, 94 F.T.C. at 1026

<sup>24</sup> See, e.g., *ITT Continental Baking Co., Inc.*, 83 F.T.C. 865, 872 (1973), *aff'd*, 532 F.2d 207 (2d Cir. 1976) (finding advertisements tended to exploit emotional concerns of parents for children); *In re Travel King, Inc.*, 86 F.T.C. 715, 774 (1975) (holding deceptive the sale of "psychic surgery" to terminally ill patients); *Phillip Morris, Inc.*, 82 F.T.C. 16 (1973) (consent) (prohibiting distribution of unsolicited razor blades); *H.W. Kirchner*, 63 F.T.C. 1282, 1290 (1963) ("If, however, advertising is aimed at a specially susceptible group of people (e.g. children), its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed.").

("[W]hat may be false and deceptive for doctors may be permissible for sellers of other products and services. Harmless puffery for a household product may be deceptive in a medical context."); *National Ass'n of Social Workers*, 58 Fed. Reg. 17,411 (April 2, 1993) (consent order issued March 3, 1993) (prohibiting NASW from restricting advertising and solicitation, except insofar as it adopts reasonable principles regarding, *inter alia*, solicitation of testimonial endorsements from current psychotherapy patients); *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued December 16, 1992) (same). The advertising that a service is "painless," for example, may be inherently deceptive and harmful when used by a practicing dentist, whereas a similar claim by, say, an institution offering evening courses toward completion of a college diploma probably would not. But CDA has offered no convincing argument, let alone evidence, that consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising it restricts. See ID at 74-75. Indeed, as far as we can tell, advertising complaints typically came from fellow dentists, not from disappointed patients. See, e.g., T. 849 (Dr. Abrahams), T. 926 (Dr. Yee).

We thus see no basis in this case for concluding that the advertising swept aside by CDA with broad strokes is categorically false, deceptive, or unfair.<sup>25</sup>

<sup>25</sup> In the light of CDA's practice, therefore, Commissioner Azcuenaga's insistence on further illumination of the "factual background" of "many of the letters" reprimanding dentists for their advertising is simply misplaced. See, e.g., *post*, at 19. The citations discussed in the text do not provide further detail regarding the surrounding circumstances of the reprimand because the factual background against which the advertising claim was made was generally of little concern to CDA when it admonished the dentist involved.

For example, MARS was not concerned with any surrounding factual circumstances when it noted that "use of the words 'Affordable Prices,' is an inexact reference to fees, and therefore, violates . . . the CDA Code and Dental Practice Act," CX 772-A (1991), that "by using the phrase 'High Standards in Sterilization,' [dentists] are advertising in

#### 4. Rule of Reason -- Conclusion

As our quick look under the rule of reason reveals, the advertising restrictions are likely to have anticompetitive effects, CDA has the necessary market power to harm competition by adopting the restraints, and there are no countervailing efficiencies or other business justifications

violation [of state law and the CDA Code of Ethics for] advertising the performance of services in a superior manner," CX 394-B (1993), that a dentist "should avoid *any* statements that imply superiority in any future advertisements published on his behalf," CX 780-A (1992) (emphasis added), that "the phrase ['We Guarantee All Dental Work For 1 Year'] is a guarantee of dental services and, therefore, violates [state law and may subject the advertising dentist to disciplinary action by the association]," CX 557-C (1992), that "use of the phrase '10% Senior Citizen Discount,' violates [state law and CDA's Code of Ethics] by failing to list the dollar amount of the nondiscounted fee for each service, and inform the public of the length of time, if any, the discount will be honored," CX 585-A-B (1991), or that an advertisement, "Call our office before December 31, 1992 and our gift to you and your family will be a Complete Consultation, Exam and X-rays (if needed) . . . [for only] a \$1.00 charge to you and your entire family with this coupon," violated state law and CDA's Code of Ethics because it "fails to list the dollar amount of the non-discounted fee for each service," CX 444-A-B (1993). See generally Complaint Counsel's Proposed Findings of Fact, Volume III, Proposed Findings 580-949, and exhibits cited therein.

Furthermore, contrary to the suggestion by the dissent, it is immaterial that any given CDA censure was, perhaps, only one among a series of criticisms CDA issued with regard to that particular dentist. Cf. *post*, at note 20 ("The reference to 'quality dentistry' is one of several claims discussed in the MARS letter, and it appears that the committee's action was based partly on a finding that the dentist in question advertised that she was a member of the ADA when she was not.") (discussing CX 387-B); see also, e.g., *id.*, at note 21 (discussing CX 478 and noting Judicial Council's objection to dentist's claim that laser surgery is revolutionary, while neglecting to note that dentist was also discouraged from advertising "gentle, comfortable and affordable" dentistry). The point of our reference to one of the restrictions that are at the heart of this case is that such advertising was held incompatible with membership in CDA. That message, regardless of whether it was coupled with citations for other (truly deceptive, unsubstantiated, false, or unfair) advertising as well, was clearly conveyed by CDA in each letter discussed in this opinion and in numerous others in the record.

that would justify the imposition of this kind of ban on broad categories of truthful and nondeceptive advertising. In short, CDA's advertising restrictions are unreasonable, make out a violation of Section 1 of the Sherman Act, and therefore violate Section 5 of the FTC Act. See *supra* note 5.

The result reached herein is not inconsistent with our earlier decisions in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988), and *Detroit Auto Dealers Ass'n, Inc.*, 111 F.T.C. 417 (1989), *aff'd*, 955 F.2d 457 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 461 (1992), which our holding today does not disturb.<sup>26</sup> In *Massachusetts Board of Optometry* we viewed the law of horizontal restraints after *NCAA* and *Broadcast Music* as presenting a series of questions, beginning with whether the restraint is "inherently suspect," that is, "the practice [is of] the kind that appears likely, absent an efficiency justification, to 'restrict competition and decrease output,'" and, if so, whether the agreement is supported by a plausible and valid efficiency justification. See 110 F.T.C. at 604. In that case we found the various advertising bans on discount advertising, affiliation advertising, use of testimonials, and sensational or flamboyant advertising to be inherently suspect, without a plausible efficiency justification, and, therefore, unlawful. *Id.* at 606-08. Following the same analytical steps in *Detroit Auto Dealers*, we likened an agreement among automobile dealers to limit showroom hours to a restriction on a form of output, found it inherently suspect and without a plausible efficiency justification, and thus declared it unlawful. 111 F.T.C. at 494-99.

<sup>26</sup> With respect to Commissioner Azcuenaga's assertion that the majority opinion overrules the earlier Commission opinion in *Massachusetts Board of Optometry*, see, *post*, at 1, 37, it is true that the majority recognizes the existence of *per se* and rule-of-reason categories — an approach to antitrust analysis that may have been blurred in the earlier decision. As to the remaining analysis in *Massachusetts Board of Optometry*, the assertion that we directly or indirectly overrule that decision is not correct.

If the instant case had been analyzed under the framework of those cases, we would have reached the same conclusion as we do here since, following *Massachusetts Board of Optometry*, we would find the restraints inherently suspect and without plausible or valid efficiency justification. Conversely, *Massachusetts Board of Optometry* and *Detroit Auto Dealers* would have arrived at the same result, had they been analyzed under the more traditional rule of reason/*per se* approach we employ here, since the restrictions in those cases either would have been found *per se* unlawful, such as the ban on discount advertising in *Massachusetts Board of Optometry*, or would have otherwise been shown to be unlawful under the rule of reason. A quick look at *Massachusetts Board of Optometry*, for example, would have demonstrated that the Board commanded sufficient market power since optometrists could not practice in the State without its approval, 110 F.T.C. at 605, that restraints, such as those on affiliation advertising, were likely to have an anticompetitive effect (and had, in part, a proven effect of raising prices), *id.* at 605-06, and that there was no efficiency or other legitimate business justification for the practice, *id.* at 606-08. In *Detroit Auto Dealers*, in turn, the Sixth Circuit indeed rejected the Commission's use of the "inherently suspect" approach on the grounds that it appeared to "aris[e] from a *per se* approach," 955 F.2d at 471, but affirmed the Commission's decision nonetheless after satisfying itself that the agreement had actual or potential anticompetitive effects, that the automobile dealers possessed market power, and that there was no valid justification for the practice, see 955 F.2d at 469-72. In this case, then, we have simply applied what we repeatedly recognized as the more "traditional antitrust analysis," *Massachusetts Board of Optometry*, 110 F.T.C. at 604 n.12, which does "not lead to different results" in the cases discussed, *Detroit Auto Dealers*, 111 F.T.C. at 494 n.18.

## VI. STATE LAW DEFENSE

Finally, we turn to CDA's argument that its actions are lawful due to the existence of similar restrictions imposed on

advertising by the State of California. Ordinarily, a private party may properly invoke the "state action" defense only if first, the State has clearly articulated a policy to permit the allegedly anticompetitive practice, and second, the State is actively supervising the conduct at issue. See *F.T.C. v. Ticor Title Insurance Co.*, 504 U.S. 621, 631 (1992) (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)); *Parker v. Brown*, 317 U.S. 341, 351-52 (1943). CDA loses under this and any other offered version of a defense based on state law.

CDA originally raised an affirmative defense that "[t]o the extent [the] restrictions alleged . . . [in] the complaint [amount to] conduct which is prohibited by state law, such restrictions are lawful," and CDA expressly disavowed that this contention amounted to assertion of a traditional "state action" defense. See Order Striking Affirmative Defense at 1; Opposition to Motion to Strike Affirmative Defense at 3-4; Answer at 12. Presumably, and wisely we think, it declined to raise the traditional state action defense because CDA could present no argument that its activities were even remotely authorized or supervised by the State. CDA maintained, instead, that antitrust law should yield since California Business and Professions Code §§ 17,200 and 17,204 "authorize CDA to file a private right of action to prohibit violations of the Code,"<sup>27</sup> and more generally, "no anticompetitive effect results if an association's code of ethics incorporates state law, and one who violates state law is deemed to have violated the association's code of ethics." Opposition to Motion at 4. The ALJ struck the defense since, in the ALJ's view, it amounted in substance to a state

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<sup>27</sup> Section 17,200 of the California Business and Professions Code simply defines the term "unfair competition," and Section 17,204 provides that actions for injunctions under that chapter may be prosecuted by, among others, "any person acting for the interest of itself, its members or of the general public." There is no intimation that the statute authorizes prosecutions for unlawful actions before private tribunals.

action defense, which, as a facial matter, was unavailing in this case.

CDA has not entirely abandoned its attempt to find shelter under state law, maintaining this time around:

"CDA reasonably believes that its interpretation of the Code of Ethics deters fraudulent advertising and advertising which is false or misleading in a material respect. The fact that during the relevant time period the State of California has also regulated advertising along the same lines as CDA in order to protect consumers from advertising that is false or misleading in a material respect further confirms the reasonableness of CDA's belief." Brief for Respondent 38.

This argument is less than clear but, indulging respondent for the moment, we will break it down into the following formulations, which at one point or another during the course of this litigation have been advanced by CDA: (1) CDA's actions are immune under the state action doctrine; (2) CDA has a defense under the antitrust laws because its prohibitions are the result of good faith reliance on parallel strictures of California law; (3) CDA's actions are efficient or otherwise reasonable since it is following state law; and (4) CDA's restrictions cannot harm competition because state law already imposes identical (or substantially similar) burdens on advertising for dental services.

Both the California Code and the regulations promulgated by the State Board of Dental examiners do, on their face, impose restrictions on advertising. See Cal. Bus. & Prof. Code §§ 651, 1680 (1994); Cal. Educ. Code § 51,520; 16 Cal. Code of Reg. §§ 1050-1053 (1993). Some of these, such as, for example, the Board's regulation regarding discount advertising, mirror the restriction imposed by

CDA.<sup>28</sup> Others, as, for example, the State's prohibitions on soliciting public school children, or on making superiority and guarantee claims, are clearly narrower in scope than

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<sup>28</sup> Title 26, Section 1051 of the California Code of Regulations, promulgated by the Board of Dental Examiners, provides:

"An advertisement of a discount must:

- (a) List the dollar amount of the non-discounted fee for the service; and
- (b) List either the dollar amount of the discount fee or the percentage of the discount for the specific service;
- (c) Inform the public of length of time, if any, the discount will be honored; and
- (d) List verifiable fees pursuant to Section 651 of the Code; and
- (e) Identify specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." 16 Cal. Code of Reg. § 1051.

Although the ALJ appears to have concluded that the Board rescinded its elaborate disclosure requirement around 1985, IDF 237 (citing CX 1622), we are less convinced that the undated document on which the ALJ relied was issued in 1985. In light of the document's summary of Section 1680 of the California Business and Professions Code, we surmise instead that it dates from sometime between 1974 and 1978, and, since it appears that in 1975 the Board had not yet promulgated regulations regarding discount advertising, the document cited by the ALJ could just as well represent an articulation of the Board's view prior to promulgation of the more extensive disclosure standards. If that is indeed the case the document is simply superseded by Section 1051 of the Board's regulations.

In any event, we do not express an opinion on the potential conflict between Section 1051 of the regulations and subsection 651(i) of the California Business Code, which provides a counterbalance to demands for specificity:

"A board or committee shall not, by regulation, unreasonably prevent truthful, nondeceptive price or otherwise lawful forms of advertising of services or commodities, by either outright prohibition or imposition of onerous disclosure requirements."

CDA's policy.<sup>29</sup> CDA's defense, however, is inapt in either case.

The first version of CDA's state action defense comes up strikingly short on the grounds that the law never contemplated private enforcement of its standards and that the State does not supervise CDA's enforcement of advertising restrictions. Respondent admitted that it is neither an agent of the State, nor authorized to interpret or enforce state laws on behalf of the State, Answer at 12, and our own review of the law finds no hint that CDA or any private association should be permitted to interpret or enforce these laws on its own. Cf. *Parker*, 317 U.S. at 350. But even mere authorization would not be enough, since, as the Court emphasized in *Parker*, "a state does not give

<sup>29</sup> California Education Code § 51,520 does not prohibit all distribution of identifying information to public and private students, but more narrowly provides:

"During school hours, and within one hour before the time of opening and within one hour after the time of closing of school, pupils of the public school shall not be solicited on school premises . . . to subscribe or contribute to the funds of, to become members of, or to work for, any organization not directly under the control of the school authorities [with certain exceptions not relevant here]."

Similarly, Section 1680 of the California Business and Professions Code appears on its face to cover some of what CDA prohibits, but it does not prohibit all quality claims, instead defining "unprofessional" conduct to include in relevant part:

"(i) The advertising of either professional superiority or the advertising of performance of professional services in a superior manner. . . .

...

"(1) The advertising to guarantee any dental service, . . . This subdivision shall not prohibit advertising permitted by Section 651."

immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351 (citation omitted). Without active supervision of the enforcement, there can be "no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 101-02 (1988). See also *Ticor*, 504 U.S. at 637-640; *Indiana Federation of Dentists*, 476 U.S. at 465; *Bates*, 433 U.S. at 359-63; *American Medical Ass'n v. United States*, 130 F.2d 233, 249 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943).<sup>30</sup> Here, there is absolutely no evidence of active state supervision of CDA's disciplinary actions or of the content of its substantive advertising restrictions. CDA's ethical review of applicants' and members' advertising is thus entirely insulated from state supervision, and thus beyond any traditional state action immunity to the antitrust laws.

This case epitomizes the danger of imputing to the State a policy choice when its implementation is not being actively supervised by the State itself. In 1985, and apparently again in 1988, a Deputy Attorney General of California addressed a memorandum to the Board of Dental Examiners, advising it of recent Supreme Court decisions in the First Amendment area and asking the Board to ensure that enforcement of the law be consistent with the Constitution. —See CX 1425; CX 1621-A. In response, the Legal Services Unit of the Department of Consumer Affairs<sup>31</sup> prepared a discussion paper analyzing the constitutionality and wisdom of limits placed on dentists' advertising. CX 1621.<sup>32</sup> The paper

<sup>30</sup> The question of state action immunity, decided in *American Medical Association v. United States*, by the Court of Appeals, was apparently not raised in the Supreme Court. See 317 U.S. at 527-28.

<sup>31</sup> The Board of Dental Examiners is part of the Department of Consumer Affairs. See Cal. Bus. and Prof Code § 101.

<sup>32</sup> As indicated in the memorandum, it addresses these issues in the context of the Board's investigation of CDA's own advertising practices. Thus, the memorandum also provides the only documented instance in which the Board initiated enforcement of the laws. We do

concludes, among other things, that recent United States Supreme Court decisions "probably invalidate the present California statutes and regulations prohibiting dentists from advertising 'superiority,'" since "[l]ike price and other facts of importance to the consumer, [truthful and nondeceptive] expressions regarding the quality of the advertiser's services are protected by the First Amendment." CX 1621-D. See also CX 1621-z-2. The paper also recognizes that to be consistent with the First Amendment, a State ought not to prohibit dentists from making claims that amount to "puffery," CX 1621-E, advertising that their prices are "very reasonable," CX 1621-V, or promoting their services by truthful and nondeceptive guarantees, CX 1621-z-4. Ultimately, it recommends:

"The statutes and regulations that limit advertising by dentists should probably be amended to eliminate patent conflicts with the federal constitutional provisions. At present, except in the telephone yellow pages, there seems to be relatively little advertising by dentists. . . . It is possible that the California statutes and regulations have made the risk of truthful and non-deceptive advertising too great for most dentists to freely tell the public about the services they provide and the prices they charge. It is also possible that the relative absence of dental advertising has harmed these segments of the public who do not use dental services because they are not conscious of their availability or cost. In any event, any California statutes and regulations that patently conflict with the federal Constitution should be repealed or amended so as to eliminate any disparity between the two sources of law." CX 1621-E. See also CX 1621-z-13 to z-15.

To be sure, the discussion paper cannot supersede codified law, and, conversely, its relevance is not limited to

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not know whether this enforcement action was abandoned after issuance of the discussion paper.

the sections that signal a retreat from the written code.<sup>33</sup> But the document provides a rather dramatic indication of the perils of private enforcement in the absence of active state supervision. Behind the scenes, officials were reexamining the legality and wisdom of the previously charted course. This might even explain the lack of enforcement. Holding that CDA's restrictions are shielded by the state action doctrine in this case would amount to imposing a continued policy choice upon the State when it has rarely, if ever, pursued it actively.<sup>34</sup>

Beyond the traditional state action defense, antitrust law does not, to our knowledge, recognize a "good faith" defense for a private conspiracy formed to enforce state law. It might be unobjectionable if CDA were to exclude members who had been found by the state Board to have violated the state statute or Board rules. That is not what CDA did. Instead, CDA appointed itself as an extra-judicial administrator of the law. We have long rejected the argument that "Congress intended for federal antitrust laws to give way when private parties, by conduct that would otherwise violate the antitrust laws, take it upon themselves to enforce their interpretation of the provisions of any state law." *Indiana Federation of Dentists*, 101 F.T.C. 57, 181 (1983), *rev'd* on other grounds, 745 F.2d 1124 (7th Cir. 1984), *rev'd*, 476 U.S. 447 (1986). As we indicated in that case, "[n]o Supreme Court decision articulating the state action doctrine can be read to endorse such an interpretation of congressional intent." *Id.* at 181-82.

In the 1942 case involving the AMA, for example, the Justice Department challenged the association's attempt to prevent physicians from affiliating with a prepaid health

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<sup>33</sup> Indeed the document took the position that the disclosure requirements for discount advertising were consistent with recent Supreme Court decisions. See CX 1621-z-7.

<sup>34</sup> Due to the lack of Board enforcement, state judicial review has been limited as well. See *Ticor*, 504 U.S. at 638-39 ("[b]ecause of the state agencies' limited role and participation, state judicial review was likewise limited").

plan. The Court of Appeals rejected the AMA's argument that its conduct was not in violation of the antitrust laws because such affiliations were illegal:

"Appellants are not law enforcement agencies; they are charged with no duties of investigating or prosecuting, to say nothing of convicting and punishing. . . . Except for their size, their prestige and their otherwise commendable activities, their conduct in the present case differs not at all from that of any other extra-governmental agency which assumes power to challenge alleged wrongdoing by taking the law into its own hands." *American Medical Ass'n*, 130 F.2d at 249.

In *Indiana Federation of Dentists*, the Supreme Court was even more explicit. The state law appeared to prevent the lay screening of dental x-rays by lay employees of insurers, and the Court held that, even assuming the association's boycott was consonant with the state law, it was not protected:

"That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it. See *Fashion Originators' Guild of America, Inc. v. F.T.C.*, 312 U.S. 457, 468 (1941). Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the state. See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985). There is no suggestion of any such active supervision here; accordingly, whether or not the policy the Federation has taken upon itself to advance is consistent with the policy of the State of Indiana, the Federation's activities are subject to Sherman Act condemnation." 476 U.S. at 465.

In short, absent active state supervision, private enforcement by CDA cannot be protected from antitrust challenge.

Even entertaining the theoretical viability of the weaker claim that the state law furnishes corroboration for CDA's belief that its practice is pro-competitive, such an argument fails on the facts of this case. Although CDA urges that it enforced what it reasonably perceived to be state law, it does not point to a single instance in which the State enforced its advertising proscriptions against a dentist. To the contrary, CDA was acutely aware that the Board had virtually abandoned its advertising regulations; indeed, CDA perceived itself as filling an enforcement void. See IDF 231-33. Moreover, CDA did not seriously attempt to ascertain the Board's views of the proper scope of state law. See, e.g., T. 1034, 1046 (Dr. Lee); T. 1537 (Dr. Nakashima); see generally, IDF 241-42. As a result, CDA lacks any real basis for understanding the true extent of the restrictions imposed by the State and cannot realistically claim that it is furthering the State's current policy choice.

Finally, and for much the same reason, we reject the argument that respondent's advertising restrictions were harmless because of the existence of similar, or even identical, state laws. Given the absence of state enforcement, it was CDA, not California, that tampered with the workings of the market for dental services. *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 17 F.3d 295 (9th Cir.), cert. denied, 115 S. Ct. 66 (1994), illustrates the point. In *Sessions*, the defendant had caused a private standard setting association to change its model fire code so as to disapprove of plaintiff's method of renovating leaking storage tanks for hazardous fluids. As a result, many fire officials refused to issue the necessary permit for plaintiff to perform its services. The court ruled for defendant on the theory that the harm was not caused by defendant's anticompetitive activity, but by the refusal of the fire officials to issue the permits, that is, by valid governmental action. The Ninth Circuit found:

"[Plaintiff] has never proved that it sustained injuries from anything other than the actions of municipal authorities. . . . [Plaintiff] has not shown that any

potential . . . customer in jurisdictions that were not enforcing the . . . [model fire code] decided not to engage [plaintiff]'s services because of the [association]'s adoption of [the provision in dispute]. Nor has [plaintiff] adduced any evidence that [defendant]'s actions caused independent marketplace harm in jurisdictions that continued to permit [the procedure offered by plaintiff]. . . . The injuries for which [plaintiff] seeks recovery flowed directly from government action." 17 F.3d at 299.

CDA would not be protected even by this broad view of the state action shield. For in our case, in contrast to *Sessions*, California apparently did not independently enforce the written law, and certainly was not alleged to have done so with regard to any of the individual dentists censured by CDA. In other words, here the sole source of enforcement was CDA, not the State. The anticompetitive harm is thus not the result of government action, but that of the private conspiracy alone.

*Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612 (6th Cir. 1982), further illuminates how the instant case differs from one in which dentists are merely following the law as authoritatively and actively interpreted and enforced by state authorities. In *Gambrel*, consumers filed an action against the Kentucky Board of Dentistry, the Kentucky Dental Association, and individual dentists alleging a conspiracy to withhold denture prescriptions from patients with the result that patients were precluded from shopping around to find the least expensive means of filling the order. Respondent Board of Dentistry argued that state law prohibited dentists from handing work orders over to patients. The court found that the Board's view was the right interpretation of state law and that the dentists were compelled by state law to deliver work orders directly to dental technicians. *Id.* at 619. In explaining that this policy was actively supervised by the State, the court noted:

"First, the policy emanates directly from the language of a state statute and not from any agreements by private individuals. . . . Secondly, the powers of enforcement are expressly conferred upon the Board of Dentistry, and it appears that historically the Board has indeed acted to uphold and enforce the regulatory scheme. In fact, the enforcement of the statute by the Board against plaintiff Gambrel and others has been one of the impelling reasons for the commencement of this action." 689 F.2d at 620.

CDA has done more than transcribe applicable state law into its Code of Ethics and urge its members to respect the law. First, the state law upon which it relied was, to its knowledge, not being actively enforced by state authorities, and second, CDA was itself actively policing its version of state law. We are aware of no antitrust exemption that would shield such activity.

## VII. FINAL ORDER

An order prohibiting respondent from continuing to restrict truthful and nondeceptive advertising and, in particular, from further enforcing its current unreasonable restraints is necessary and in the public interest. The order we impose is similar to those entered in other cases in which we had found unlawful interference with advertising by professional associations, but crafted to reflect the respondent's particular circumstances. See, e.g., *Massachusetts Board of Optometry*, 110 F.T.C. at 632-35; *American Dental Ass'n*, 100 F.T.C. 448, 449-53 (1982); *AMA*, 94 F.T.C. at 1036-41. We believe this remedy to have a "reasonable relation to the unlawful practices found to exist," and therefore to be within our authority to impose. See *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 613 (1946).

Our order that respondent cease and desist from interfering with such truthful and nondeceptive advertising, Order Part II, leaves respondent free to act against member advertising that it reasonably believes would be false or

misleading within the meaning of Section 5 of the Federal Trade Commission Act, and against its members' uninvited, in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence. The order also leaves respondent free to encourage its members to obey state law and to discipline members who have been reprimanded, disciplined, or sentenced by any court or any state authority of competent jurisdiction.<sup>35</sup>

Respondent must, however, cease and desist from the unlawful suppression of advertising, and from urging others to engage in such actions, Order Part II, as well as eliminate unlawful provisions from any policy statement and terminate affiliation with components that would continue to engage in behavior that would be contrary to the order if engaged in by respondent, Order Part III. The disaffiliation provision, particularly with its grace period to permit continued affiliation with components that will discontinue practices that, if engaged in by the respondent, would be unlawful, Part III.B., reflects the approach of the Commission order issued in *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued December 16, 1992). Part III.A.1, which contained an erroneous reference to section 21 of CDA's Code of Ethics, has been changed to reflect the proper section of CDA's code (Section 22) that deals with claims of exclusivity.

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<sup>35</sup> The ALJ's order prohibited CDA from restricting representations that do not contribute to the public esteem of the profession. See ID at 81 (Order at II.A.8). Our order omits that provision. Although CDA cited the goal of protecting the public esteem of the profession in prohibiting dentists from distributing certain information during school screenings, see, e.g., CX 1115-A, we find that our order adequately addresses CDA's unlawful activity and refrain from including the broader provision at this time. Of course, to the extent that respondent were to use this as an excuse to reinstitute any of the practices that we have found to violate Section 5, such actions would violate the order.

To publicize its change in long-held policy, respondent must inform current members of this action and the resulting change in policy. Order Part IV.A. Notification requirements have long been recognized as falling within our remedial authority. See, e.g., *Massachusetts Board of Optometry*, 110 F.T.C. at 619. Respondent asks that we not require it to distribute its *Journal* via first class mail. We see no reason to do so, and neither does complaint counsel. Accordingly, we have amended Judge Parker's order on this point to reflect unambiguously that we require only the complaint, order, and announcement, as well as any documents revised pursuant to Part III.A, but not the *CDA Journal* itself, to be distributed via first class mail. Respondent also objects to the requirement that it distribute the complaint on the grounds that complaint counsel failed to prove all the allegations therein. Since we find that complaint counsel has proved all the allegations in the complaint, respondent's objection on this point is denied.

Because respondent's restraints have been successfully imposed over an extended period of time dating back well over a decade, we find it necessary and reasonable to include further remedial provisions aimed at reversing the suppression of advertising (and, thereby, of competition) respondent has achieved over the years. Respondent must therefore inform persons, who are currently subject to disciplinary order or suspended from membership by reason of their or their employers' advertising or solicitation practices, of the complaint and order in the required manner, reconsider the disciplinary or other proceeding, and inform the person of its decision upon reconsideration. Part IV.B. Respondent has asked that we extend the time under Parts IV.B.2 and IV.B.3 to one hundred and twenty days, due to the alleged difficulty of locating and reviewing relevant old files. Although complaint counsel correctly notes that respondent's arguments regarding its need for time are rather conclusory, we do not see the public interest compromised in this case by permitting respondent to conduct the review and final notification of this group of persons within one hundred and twenty days, provided the persons described in Part

IV.B. (*i.e.* those who are currently subject to discipline or suspension due to their advertising or solicitation practices) are notified and informed in the manner described in Part IV.B.1 within thirty days.

Next, respondent is to distribute similar information, including an application form for membership, to those whose membership over the last ten years was not approved or was discontinued as a result of CDA's objections to advertising or solicitation practices. Respondent is to review any application for membership received in response and inform persons of their acceptance or of the reasons for denial of their application. Part IV.C. Respondent has asked that we strike this provision, arguing that "applications are received, processed, and stored at the component level and the components are not respondents in this action; moreover, complete records covering a ten year period may not exist." Brief for Respondent 82. In reviewing the record in this case, we have found significant cooperation between respondent and its component societies in the course of hundreds of disciplinary proceedings, leading us to believe that respondent can count on the usual and customary cooperation of its affiliated components in this matter. Finally, respondent has not even alleged, let alone provided any evidence, that complete records covering the last ten years do not, in fact, exist. We therefore see no reason, at this time, to alter Judge Parker's order on this point.

Respondent must also distribute certain information to every new applicant for the next five years, Part IV.D, keep, and file with the FTC, records of each action taken with respect to the advertising of the sale of dental services for three years, Part V, establish an internal compliance procedure for the next five years to ensure that the order is complied with at all levels of the organization and file progress reports at specified times, Part VI.A-C, maintain and make available for inspection records of specified actions relevant to this order, Part VI.D., and notify the FTC of specified organizational changes, Part VI.E. These record-keeping provisions are essential given respondent's

continued assertion that the unreasonable restraints were imposed only in an effort to suppress untruthful or deceptive advertising, or such advertising that would cause unreasonable, unavoidable harm to consumers. In order to permit proper review of respondent's actions in the future, particularly in light of the safe harbor carved out by the order, the record-keeping and reporting requirements are, in our view, reasonable and reflect similar requirements imposed in other cases. *See, e.g., American Psychological Ass'n*, 57 Fed. Reg. at 46,030; *Medical Staff of Memorial Medical Center*, 110 F.T.C. 541, 547 (1988); *Tarrant County Medical Society*, 110 F.T.C. 119, 123 (1987).

Finally, we have added to Judge Parker's order a sunset provision reflecting the Commission's recently adopted policy in that regard. *Federal Trade Commission, Duration of Existing Competition and Consumer Protection Orders*, 60 Fed. Reg. 42,481 (Aug. 16, 1995).

#### VIII. CONCLUSION

The California Dental Association has declared itself the arbiter of good advertising by member dentists and, in so doing, has restrained competition among its members in violation of Section 5 of the FTC Act. Without impugning CDA's general efforts to serve the public, we find that the Association's core activities provide its members sufficient pecuniary benefits to bring it squarely within our jurisdiction. We find further that CDA is at the hub of an agreement among its members to restrict competition in the market for dental services, and it is legally quite capable of serving that role. The combination has suppressed advertising of the prices, quality, and availability of dental services in California, thereby impairing the dissemination of information that is important to consumers and forms a basis of rivalry among competing service providers. The attack on price competition, long recognized as the lifeblood of a free economy, is inexcusable in principle and must be categorically condemned even in the professional setting before us here. The restrictions on advertising of the quality

and availability of professional services, on the other hand, are entitled to a quick look under an individualized examination of the competitive benefits and burdens they entail. Since CDA's restraints fall far short of being justified even under this approach, however, we find that they are unlawful as well.

**DISSENTING OPINION OF COMMISSIONER**  
**MARY L. AZCUENAGA**  
**in California Dental Association, D. 9259**

As described in the opinion of the majority, the conduct at issue in this case carries a patina of unlawfulness that few could disregard. Restraints on advertising long have been suspect under the law. Those who would practice such restraints have been pressed increasingly to justify their conduct, and rightly so. But the gloss applied by the majority to the evidence in this case, although mesmerizing, proves chimerical on examination, like the glow of a firefly that captivates us for a time but does not withstand the hard light of day. Certainly there is evidence in the record on which to base suspicion, but it is exceedingly meager and falls short of establishing liability when viewed in context with other evidence and the law. I cannot join my colleagues in finding liability on this record. Also, I cannot join my colleagues in overruling Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988) ("Mass. Board").

Although I do not join the Commission in overruling Mass. Board, I have analyzed the case using the same traditional analysis as the majority, and there is much in the majority's opinion with which I agree. I concur in the conclusion that the Commission has jurisdiction over the California Dental Association ("CDA"). In addition, I agree that a categorical and complete ban on price advertising, imposed by a trade or professional association, would be per se unlawful and that before condemning an association's restrictions on nonprice advertising under Section 5 of the FTC Act, the Commission should perform a rule of reason

analysis. Finally, I agree that the CDA has not made out a state action defense.

Despite these areas of agreement, I must dissent. In reviewing the record, the Commission has not come to grips with the true nature and extent of CDA's restrictions on advertising. The facts are hotly contested by the parties. CDA insists that it prohibits only false and misleading advertising, as defined by the state law of California, and attributes incidents of excessive restraints to local dental societies that were not named in the complaint. Complaint counsel argue that CDA bans a wide range of useful and informative advertising that would not be considered deceptive under Section 5 of the FTC Act.

The theory of liability is that CDA enforced facially legitimate rules against false and deceptive advertising in such a way as to limit truthful advertising. Such a finding should rest on evidence of a pattern of enforcement decisions. I question whether the evidence cited in the Commission opinion supports finding such a pattern. This is particularly true given the strong indications in the record that CDA's enforcement did not have the sweeping impact suggested by the majority.

With respect to restraints on price advertising, I question whether CDA in fact imposed such a clear ban as to bring its conduct within the per se rule, and the prudent course would be to remand for additional findings of fact. Restraints on price advertising that do not constitute such a ban, such as disclosure requirements that may have some informational benefit to consumers and impose some burden on advertisers, also may be unlawful<sup>1</sup> but should be addressed under the rule of reason. The effect of restraints on nonprice advertising on the price and output of the advertised product may be more

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<sup>1</sup> "Restrictions on price advertising are unlawful because they are aimed at 'affecting the market price.'" Massachusetts Board of Registration in Optometry, 110 F.T.C. 549, 606 (1988) quoting United States v. Gasoline Retailers Ass'n, 285 F.2d 688, 691 (7th Cir. 1961).

attenuated and also should be addressed under the rule of reason. The evidence that CDA imposed restraints on nonprice advertising by its members is weak, but even assuming such conduct occurred, the analysis of the majority does not support a holding of liability.

I disagree with the conclusion of the majority that CDA has market power. In presenting their case, complaint counsel relied on a theory of virtual per se illegality and did not offer evidence, even in the form of testimony of an expert economist, on fundamental elements of a rule of reason analysis, such as market definition, barriers to entry and anticompetitive effects. CDA did introduce economic evidence that it has no market power, and the Administrative Law Judge agreed. The majority reverses, entering a de novo finding of market power. Slip Op. at 32. Some persuasive evidence of market power is essential to a finding of liability under the rule of reason. The evidence of market power here is so sparse and superficial as to be virtually nonexistent. Imposing liability on this record for restraints on nonprice advertising is functionally equivalent to condemning them under the per se rule.

I disagree with the conclusion of the majority that entry into the California dental market is difficult. The majority's analysis of the evidence on entry seems highly inconsistent with the Commission's usual analysis and, absent explanation, appears to suggest that the Commission has significantly relaxed its standard for establishing that entry is difficult. A quick look analysis based on a limited record has much to recommend it, but only if that record is held to the same standards of analysis as in a more extensive review. No anticompetitive effects having been shown, the complaint should be dismissed with respect to the conduct judged under the rule of reason.

## I.

The opinion of the majority implicitly overrules the method of analysis set forth in Massachusetts Board of

Registration in Optometry, 110 F.T.C. 549, 602-04 (1988). Whatever the reason for failing to use the word "overrule," it will be clear to any reasonable lawyer that that is what the majority has done. Instead of adhering to Mass. Board, the Commission endorses the traditional dichotomy between per se and rule of reason analysis. Slip Op. at 16.

It will be unfortunate if the Commission's decision signals a return to the analysis of old in which the significance of competitive effects and efficiencies was sometimes obscured by efforts to fit conduct in either the per se or rule of reason pigeonhole. In 1988, when the Commission decided Mass. Board, Supreme Court decisions had opened the door to an antitrust analysis that focuses more on competitive effects and efficiencies than on labels.<sup>2</sup> Mass. Board was a considered attempt to further that trend. Because there have been few opportunities for the Commission to explain Mass. Board in the context of a fully developed record, no body of precedent implementing its focus on competitive effects and efficiencies has evolved.<sup>3</sup>

The analytical framework set forth in Mass. Board, properly applied, has much to recommend it. This case presents an excellent opportunity to clarify and build on Mass. Board.<sup>4</sup> One particularly disappointing aspect of the opinion of the majority is the absence of a satisfactory discussion of efficiencies, the omission of which would have been more glaring if the Commission had used a Mass.

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<sup>2</sup> See NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984); Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979).

<sup>3</sup> Perhaps not surprisingly, Mass. Board, a precedent-setting case in terms of the Commission's analytical approach, created a number of analytical difficulties that were left for resolution in future cases. See, e.g., Azcuena, "Market Power as a Screen in Evaluating Horizontal Restraints," 60 Antitrust L.J. 935, 939 (1992).

<sup>4</sup> The Administrative Law Judge misapplied the Mass. Board analysis in his Initial Decision, and the opinion has been widely misconstrued elsewhere.

Board analysis.<sup>5</sup> The decision of the majority to cast Mass. Board aside before exploring its potential is cavalier and premature and sends the wrong signal about the importance of careful economic analysis, particularly the consideration of efficiencies.<sup>6</sup>

## II.

At this point in an administrative proceeding, the nature and extent of CDA's restrictions on advertising should be well defined and substantiated, but they remain remarkably murky in this case. One difficulty in reviewing the record is that complaint counsel evidently assumed that actions by local dental societies are attributable to CDA, although the complaint did not name the local dental societies and the record does not establish that the local societies acted under the direction and control of CDA. Although complaint counsel submitted numerous exhibits relating to enforcement over a period of many years, most of those exhibits relate to enforcement by local dental societies, not by CDA. Some of the exhibits, which go back to the early 1980's, apparently do not reflect current or even recent CDA practice. Tr. 851. The majority seems to agree with CDA's argument that it cannot be condemned on the basis of acts by local societies without some evidence linking CDA to the challenged conduct.

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<sup>5</sup> One source of confusion under Mass. Board is that the term "efficiencies" as used in that opinion and in antitrust analysis generally encompasses much more than simple savings in terms of dollars and cents. In the antitrust lexicon, "efficiencies" includes valid business justifications such as explanations of why a particular product or service could not be brought to market absent the conduct that is subject to examination, the need to differentiate a product, or other circumstances consistent with a procompetitive rationale.

<sup>6</sup> Although I do not join Commissioner Starek's separate opinion, his discussion of the virtues of the analytical approach in Mass. Board over that employed by the majority has a good deal of merit.

The majority does not adopt the findings of fact in the Initial Decision and, disclaiming reliance on those findings, relies instead on its "independent review of the record." Slip Op. at 10 n.6.<sup>7</sup> The majority characterizes the CDA's actions, but despite its independent review, offers little in the way of findings of fact to resolve important disagreements between the parties.<sup>8</sup>

The opinion of the majority fails to reconcile, or otherwise dispose of, conflicting evidence on a number of significant issues. A fundamental question is whether and to what extent CDA has restricted advertising by California dentists. On this record, it is difficult to find that CDA's restrictions adversely affected dentists who want to advertise or that the restrictions caused anticompetitive effects. Although CDA discouraged specific advertisements (usually

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<sup>7</sup> On appeal, the Commission conducts a *de novo* review. 16 C.F.R. § 3.54 (a) ("Upon appeal from or review of an initial decision, the Commission \* \* \* will, to the extent necessary or desirable, exercise all the powers which it could have excised if it had made the initial decision."); *The Coca Cola Bottling Co. of the Southwest*, 5 Trade Reg. Rep. (CCH) ¶ 23, 681 at 23, 405 (FTC 1994) ("Our review of this matter is *de novo*.").

<sup>8</sup> To rebut this dissent, the majority offers not 6 at page 10, a footnote of impressive length, that cites CDA actions relating to sixty-two dentists. On examination, the examples cited fail to match the promise of rebuttal presaged by the length of the note. Thirty-eight of the sixty-two examples support a finding of the majority with which I agree, i.e., "[t]he record supports the majority's finding that CDA enforces the disclosure requirements imposed by the California State Board of Dental Examiners." See text accompanying note 16, *infra*. Eleven examples of claims related to fees are not inconsistent with my view that the broad characterizations of the majority regarding restraints on fees cannot stand in light of probative, conflicting evidence. See note 15, *infra*. Seven more examples of superiority claims based on sterilization practices fail to answer the fundamental question I have raised whether this particular interpretation may be justified. See note 23 and accompanying text, *infra*. The same can be said for four examples of CDA actions based on a theory of unjustified expectations. See note 21, *infra*. Other examples cited in note 6 are discussed in the text of the majority opinion and in the text of this dissent.

advertisements that violated state statutes or regulations defining and prohibiting deception), there is not empirical evidence in the record that CDA members advertise less frequently than dentists in California who are not members of CDA or that dentists in California advertise less than dentists in other states.

In fact, the preponderance of the evidence suggests that some advertising by dentists is flourishing in California. CDA, in a very graphic demonstration, filed a one and one-half inch thick appendix of telephone yellow pages advertising by California dentists. Mr. Christensen, a witness called by complaint counsel, who owns an advertising agency in Corte Madera, California, testified about his fifteen years of experience specializing in advertising and marketing by dentists. Tr. 545, 571. He said that most incidents of advertising restrictions by CDA occurred in the early 1980's. Tr. 609. Mr. Christensen testified that since 1988, he had heard of only one or two letters from dental societies regarding advertising. Tr. 616-17. His "Manual," which is furnished to clients of his advertising agency to apprise them of his approach to marketing and advertising by dentists, advises that a dentist can say what he wants as long as it is not false or misleading. Tr. 616-17; RX 72 at 111. Another of complaint counsel's witnesses testified about building a dental practice with a marketing campaign that was the "[m]ost aggressive I've ever seen," while remaining an active member of CDA. Tr. 790, 765-66. On balance, given the absence of evidence showing a reduction in advertising, the record suggests that CDA has not deterred dentists in California from advertising.

I cannot joint the majority's expansive characterizations of CDA's actions. See Slip Op. at 17. With respect to price and discount advertising, the majority draws unqualified conclusions regarding the "effective prohibition of advertising," the "silencing effect" of CDA and the imposition of a broad ban on price advertising. Slip Op. at 17-19. With respect to nonprice claims, the majority draws broad conclusions that the nonprice advertising proscribed by

CDA is vast and that CDA effectively bans all quality claims. Slip Op. at 25. As discussed below, I believe that these characterizations overstate the evidence.

### 1. Alleged Restraints on Price Advertising

I agree with the majority that a private conspiracy to prohibit price advertising is *per se* unlawful. Under the *per se* rule, the first and ultimate question in deciding liability is whether CDA in fact prohibits price advertising. CDA has no rule or other explicit prohibition against price advertising.

It is possible, however, that the association in effect prohibits price advertising by the manner in which it interprets and enforces facially legitimate rules. Does CDA do so? The evidence is conflicting. CDA officials testified that its standard for evaluating advertisements is whether the advertisement is false or misleading, but a new CDA actions cited by the majority, particularly letters by CDA's membership application review committee, are not easily reconciled with the testimony. On balance, I question whether the record provides a sufficient basis to find that CDA prohibits price advertising.

Members of CDA must agree to abide by the association's constitution, bylaws and Code of Ethics. Slip Op. at 3. Section 10 of CDA's Code of Ethics provides:

Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect. (CX-1484-Z-49.)

On its face, Section 10 of the CDA Code seems unobjectionable,<sup>9</sup> and the majority fails to identify specific language in Section 10 that explicitly or implicitly prohibits truthful advertising.

The majority also refers to several CDA advisory opinions. Advisory opinions are not part of the Code of Ethics, and a dentist does not necessarily subscribe to the advise by joining CDA, although he or she agrees to abide by the official rulings of the organization.<sup>10</sup> The only prohibition in the CDA's ethical code is against false and misleading advertising. The difficult question is whether CDA in effect prohibited price advertising.

Advisory Opinions 2(b), 2(d), 3 and 4 are singled out by the majority for particular attention.<sup>11</sup> Slip Op. at 17. The

<sup>9</sup> The first and third sentences of Section 10 merely prohibit false and misleading advertising. The second sentence relating to "the esteem of the public" is somewhat ambiguous, but the CDA enforcement actions cited in the opinion of the majority do not rely on this sentence.

<sup>10</sup> The preamble to the Code of Ethics states:

The CDA Judicial Council may, from time to time, issue advisory opinions setting forth the council's interpretations of the principles set forth in this Code. Such advisory opinions are 'advisory' only and are not binding interpretations and do not become a part of this Code, but they may be considered as persuasive by the trial body and any disciplinary proceedings under the CDA Bylaws. (CX-1484-Z-47.)

<sup>11</sup> They provide:

2. A statement or claim is false or misleading in any material respect when it:

(b) Is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts; . . .

(d) Relates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors; . . .

majority neither analyzes the specific language of these advisory opinions nor holds them unlawful on their face.<sup>12</sup> These CDA advisory opinions appear to derive from and not extend beyond the scope of the California state law of deception. Section 651 of the California Business and Professions Code prohibits the dissemination of false or misleading information by health care professionals, including dentists.<sup>13</sup>

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3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as "as low as," "and up," "lowest prices," or words or phrases of similar import.

4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity--for example, "low fees"--must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity. (CX-1484-Z-49-50).

<sup>12</sup> Section III(A)(2) of the order requires CDA to remove Advisory Opinions 2(c), 2(d), 3, 4, and 8. Opinion 2(c) states that a statement is misleading when it "is intended or is likely to create false or unjustified expectations of favorable results and/or costs."

<sup>13</sup> The statute, which was amended in 1992, with the changes effective January 1, 1993, provides, in part:

(b) A false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which does any of the following:

(2) Is likely to mislead or deceive because of a failure to disclose material facts.

(3) Is intended or is likely to create false or unjustified expectations of favorable results.

(4) Relates to fees, other than a standard consultation fee or a range of fees for specific types of services, without fully and specifically disclosing all variables and other material factors . . . .

(c) Any price advertisement shall be exact, without the use of such phrases as "as low as," "and up," "lowest prices" or words or phrases of similar import. Any advertisement which refers to services, or costs for

The language of the CDA advisory opinions is very close, but not identical, to that of the statutes. Opinion 2(b) defines as false and misleading a statement that "[i]s likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts," and Section 651(b)(2) of the statute covers a statement that "[i]s likely to mislead or deceive because of a failure to disclosure material facts." Opinion 2(d) defines as false and misleading a statement that "[r]elates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors," and Section 651(b)(4) includes a statement that "[r]elates to fees, other than a standard consultation fee or a range of fees for specific types of services, without fully and specifically disclosing all variables and other material factors."

Opinion 3 provides that price advertisements "shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import." Section 651(c) provides that price advertising "shall be exact, without the use of phrases as 'as low as,' 'and up,' 'lowest prices' or words or phrases of similar import," and also that "[t]he price for each product or service shall be clearly identifiable."

Advisory Opinion 4 provides "[a]ny advertisement which refers to the cost of dental services and uses words of

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services, and which uses words of comparison must be based on verifiable data substantiating the comparison. Any person so advertising shall be prepared to provide information sufficient to establish the accuracy of that comparison. Price advertising shall not be fraudulent, deceitful, or misleading, including statements or advertisements of bait, discount, premiums, gifts, or any statements of a similar nature. In connection with price advertising, the price for each product or service shall be clearly identifiable. The price advertised for products shall include charges for any related professional services, including dispensing and fitting services, unless the advertisement specifically and clearly indicates otherwise. (1 Deering's Business and Professions Code Annotated of the State of California § 651 (1995 Supp.).)

comparison or relativity -- for example, 'low fees' -- must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity." Section 651(c) provides that "[a]ny advertisement which refers to services, or costs for services, and which uses words of comparison must be based on verifiable data substantiating the comparison. Any person so advertising shall be prepared to provide information sufficient to establish the accuracy of that comparison."

The close parallel between the CDA advisory opinions and the statute strongly suggests that the association simply followed the California statutory definition of false and misleading advertising by health professionals. A side-by-side comparison of the language does not suggest that CDA extended or attempted to extend that coverage of the statute.

The substantiation and disclosure requirements in Section 651(b) and (c) of the California statute reflect a concern about misleading advertisements making price comparisons. By issuing guides relating to deceptive price comparisons, the Commission has indicated that the concern is legitimate and that disclosure and substantiation rules are an appropriate way to address the concern. 16 C.F.R. § 233. For example, the Commission requires:

"... whenever a 'free,' '2-for-1,' 'half price sale,' '1-cent sale,' '50% off,' or similar type of offer is made, all the terms and conditions of the offer should be made clear at the outset." (16 C.F.R. § 233.4(c).)

The majority suggests that although the CDA rules on their face may seem "innocuous," CDA enforced the rules in an anticompetitive fashion, Slip Op. at 17, citing a handful of CDA actions to support this conclusion. Some of the CDA actions appear questionable, but the incidents cited are too limited in number to show a pattern of enforcement sufficient to establish a CDA policy to prohibit price advertising. One

of the most questionable CDA actions is Exhibit CX-118, which is a 1993 letter from CDA's Membership Application Review Committee (MARS) to the Tri-County Dental Society, recommending denial of membership to Dr. Buckwalter, because he advertised "Reasonable Fees Quoted in Advance," "No Cost to You," and "Major Savings." Although the MARS letter cited and ostensibly relied on Section 651 of the California Code, no clear parallel to the statute is apparent.

The majority also cites an April 1988 MARS letter that appears to prohibit claims that fees are "reasonable," CX-301, but the majority acknowledges that CDA abandoned this position in 1991. CX 1223-D; Tr. 1453 (Dr. Nakashima).<sup>14</sup> In summary, there is conflicting evidence about claims of "reasonable" or "affordable" fees, but this is hardly a persuasive showing of a pattern of conduct that effectively prohibited fee advertising.<sup>15</sup>

<sup>14</sup> Some local dental societies may not have gotten word of the 1991 action. See CX-391 (October 19, 1993, letter from the Tri-County Dental Society); CX-778 (May 27, 1993, letter from the Tri-County Dental Society). Abandonment does not moot the case, but it may be relevant in assessing whether the evidence establishes a pattern of conduct.

<sup>15</sup> In footnote 6 at page 10, the majority cites thirteen additional CDA letters related to price advertising. Ten of the letters relate to claims that fees are "affordable." CX-335 (Dr. Dubin 1991); CX-32 (Dr. Bales 1991); CX-514 (Dr. Stygar 1991); CX-866 (Dr. Rosenson); CX-50 (Dr. Jung 1990); CX-602 (Dr. Leizerovitz 1991); CX-772 (Dr. Nguyen 1991); CX-755 (Dr. Moy 1992); CX-957 (Dr. Skinner 1992); and CX-949 (Dr. Singhal 1990). One relates to the use of the word "reasonable." CX-1042 (Dr. Bales 1991). It certainly would be questionable for an association to prohibit all such claims, but the evidence is conflicting, and CDA may prohibit only unsubstantiated claims. A number of CDA ethics officials testified that CDA's Code prohibits only unsubstantiated claims. Tr. 365-66 (Dr. Abrahams testified that the claim is meaningless" and does not violate the Code of Ethics and is "so prevalent that we would spend a lot of time enforcing it . . . ."); Tr. 1347 (Dr. Kinney testified that claims of reasonable or affordable prices are acceptable if verifiable); Tr. 1479 (Dr. Nakashima testified that such a claim is acceptable "if it can be substantiated"); Tr.

The record supports the majority's finding that CDA enforces the disclosure requirements imposed by the California State Board of Dental Examiners.<sup>16</sup> The objective of a disclosure requirement is to place more information in the hands of consumers. A disclosure requirement is not a prohibition on price advertising, although required disclosures may in some circumstances be so extensive and burdensome that price advertising is effectively prohibited. Although the majority hypothesizes about the burden of the state Board's regulation, a witness with broad experience in advertising by California dentists, called by complaint counsel, testified that the disclosure rules did not burden price advertising. Tr. 628, 648-50.

The majority quotes the disclosure requirements as they appear in the 1988 "Advertising Guidelines" issued by the CDA, but without identifying the source of the disclosure requirement. CX-1262. Slip Op. at 17. The disclosure requirements were promulgated by the California Board of Dental Examiners, not CDA. Preceding the disclosure requirements quoted by the majority, CDA's Advertising

1574 (Dr. Cowan); Tr. 1044-45 (Dr. Lee testified that a claim of reasonable or affordable fees is acceptable if verifiable).

<sup>16</sup> Footnote 6 at page 10 of the majority opinion provides additional examples. CX-18 (Dr. Asher 1993); CX-444 (Dr. Hiatt 1993); CX-387 (Dr. Ghadimi 1992); CX-366 (Dr. Foroosh 1993); CX-333 (Dr. Dorotheo 1993); CX-126 (Dr. Butt 1991); CX-51 (Dr. Beheshti 1991); CX-49 (Dr. Beheshti 1990); CX-27 (Dr. Azarmi 1993); CX-4 (Dr. Aguilera 1990); CX-297 (Dr. Davtian 1991); CX-258 (Dr. Daher); CX-248 (Dr. Crowley); CX-206 (Dr. Choi 1992); CX-151 (Dr. Casteen 1993); CX-516 (Dr. Kachele); CX-514 (Dr. Stygar 1991); CX-497 (Dr. Johnston 1993); CX-474 (Dr. Jeffs 1990); CX-602 (Dr. Leizerovitz 1991); CX-557 (Dr. Kita 1992); CX-668 (Dr. Massa 1992); CX-661 (Dr. Mardirossian 1990); CX-646 (Dr. Maiden 1992); CX-830 (Dr. Paulsen 1990); CX-828 (Dr. Patel 1990); CX-780 (Dr. Norzagaray 1992); CX-775 (Dr. Nicholl 1993); CX-772 (Dr. Nguyen 1991); CX-755 (Dr. Moy 1992); CX-745 (Dr. Moran 1991); CX-1000 (Dr. Stuki 1992); CX-957 (Dr. Skinner 1992); CX-913 (Dr. Schleuniger 1992); CX-865 (Dr. Rosenkranz 1993); CX-856 (Dr. Rocha 1993); CX-855 (Dr. Rocha 1993); CX-843 (Dr. Ramalingam 1993).

Guidelines make this clear by stating that "the Rules and Regulations of the State Board of Dental Examiners require you to list all of the following in your advertisement(s)" and then listing the disclosures quoted at page 17 of the majority opinion. CX-1262-I. The CDA Advertising Guidelines appear accurately to recite Section 1051 of the rules of the California Board of Dental Examiners. 16 Barclays California Code of Regulations § 1051, RX-136-E.

The majority concludes that the disclosures required by the California Board of Dental Examiners stifle discount advertising. The disclosures required by the Board include the nondiscounted fee, the discount in dollars or percentage terms, the duration of the discount offer, and the group that qualifies for the discount, plus any other conditions or restrictions on the offer. CX-1262-I.

The record shows that, as a practical matter, these disclosure requirements do not preclude discount advertising. For example, the Advertising Guidelines illustrate the disclosures required for a discount on a cleaning: "\$10 off (regularly \$25.00) Good through June 1, 1985." CX-1262-I. The disclosures in this illustration do not make the offer unmanageable or ineffective and, indeed, the majority does not articulate a concern about such discount advertising. Rather, the majority is concerned about the possibility that a dentist might want to advertise an across-the-board discount on fees for many or all services. Slip Op. at 18.

The majority relies on the testimony of Dr. Barry Kinney, a member of CDA's Judicial Council, to infer that CDA might require an advertising dentist to include disclosures that would fill two pages in a telephone book. Slip Op. at 18, quoting Tr. 1372. Dr. Kinney testified that if a dentist wanted to offer an across-the-board discount, then "you would have to be a little flexible" and not require disclosure of every fee. Slip Op. at 19, quoting Tr. 1373. Indeed, Dr. Kinney indicated that CDA interpreted the California Board of Dentistry rules to avoid oppressive disclosure requirements. He said that in the event of an across-the-

board discount advertisement, the CDA Judicial Council would verify that the dentist was, in fact, doing what he advertised and that "I don't think that we would hold somebody to these restrictions if in fact they were going to do across-the-board advertising." Tr. 1375.

It is unclear whether CDA has adopted Dr. Kinney's flexible view. The majority finds that CDA insisted on a "full panoply of disclosures," citing several exhibits. For example, Exhibit CX-206-A, a September 3, 1992, letter from CDA's MARS to the San Gabriel Valley Dental Society, recommends denial of a dentist's membership application because her advertisement, "20% off New Patients with this Ad," violated Section 1051 of the rules of the Board of Dental Examiners "by failing to list the dollar amount of the nondiscounted fee for each service."<sup>17</sup> This 1992 letter seems inconsistent with the flexible view of Dr. Kinney. The majority also cites a 1991 instance in which the MARS committee recommended that a dentist be admitted but counseled about advertising a "10% senior citizen discount" without disclosing the nondiscounted fee and the duration of the offer. CX-585-A. Given the testimony of two CDA officials that advertising senior citizen discount would be acceptable, Tr. 872, 1351, it is unclear whether the association's view has changed since 1991. Overall, the evidence appears to be conflicting on the manner in which CDA approaches this Board rule.

The record does not establish that the disclosures required under Section 1051 and derivatively by CDA constituted a prohibition of discount advertising. Indeed, complaint counsel's own witness seriously undercut the theory that CDA's enforcement of Section 1051 of the Board rules suppressed discount advertising. Although Mr. Christensen, whose experience in the market is described above, said in

<sup>17</sup> The record contains little explanation of the factual background or the reasons for the conclusion in the MARS letter. It is unclear whether the 20% discount was for all dental work needed by new patients or just for the initial consultation.

response to hypothetical questions by complaint counsel that excessive disclosures might reduce the effectiveness of a discount advertisement, Tr. 598-600, he testified on cross-examination that as a matter of marketing strategy, his agency recommends that specific discount advertisements be directed to a limited number of people for a limited time and that the ads show the usual and customary charge from which the discount is taken. Tr. 625-26, 648. The disclosures recommended by Mr. Christensen's advertising agency appear to coincide with the disclosures required by the California Board, but his reason for the recommendation was based on the marketplace not the rule. He recommends disclosure because "[w]e don't want to mislead anyone." Tr. 628. Mr. Christensen also recommended against advertisements of across-the-board discounts because an across-the-board discount might be construed as a price reduction, and an insurance company might reduce the "usual and customary rate" to the lower rate for the purposes of reimbursement. Tr. 629.

Mr. Christensen testified that "there is no burden whatsoever" in disclosing the UCR charges (usual and customary rate), an expiration date and the discounted offer price in an advertisement. Tr. 628, 648-50. Mr. Christensen also offered explanations of the relative scarcity of across-the-board discount advertisements in the yellow pages or elsewhere. As to the yellow pages, he said that PacBell generally does not allow across-the-board discount advertisements. Tr. 645. With respect to the marketplace in general, he said that across-the-board discounts "won't work as a marketing tool." Tr. 645. In his opinion, such advertisements are ineffective and would disappear from the marketplace on their own. *Id.* Mr. Christensen said that the one situation in which across-the-board advertisements appear to be effective is for senior citizen discounts. Tr. 651. In that situation, he recommends that his clients include a statement saying to call for details regarding the offer. *Id.* Dr. Kinney testified that senior citizen discount advertisements are acceptable. Tr. 1351. See also Tr. 872 (Dr. Abrahams). In fact, according to Dr. Kinney, the CDA

sponsored a "Senior Dent" program that offered at 15 percent discount to seniors. *Id.*

I cannot join the opinion of the majority insofar as it concludes that CDA effectively prohibited price advertising for dental services. Rather than extracting sweeping conclusions from the conflicting evidence and testimony, I would remand for findings of fact regarding the restrictions on price advertising imposed by CDA (not local societies). I would require specific findings on whether the disclosure requirements are, in effect, a prohibition on price advertising. If the disclosure requirements impose no real burden on price advertising, as Mr. Christensen testified, I would be unlikely to find that they constitute a prohibition on price advertising. To the extent CDA does not effectively prohibit price advertising, an analysis under the rule of reason should address benefits to consumers, if any, of its requirements for price advertising and the extent to which the disclosures impose a burden on advertisers. Additional factual findings on these issues would be helpful in that analysis.

Under the per se rule, all we need find for liability to attach is that the conduct occurred. On this record, I cannot reach that threshold and ultimate finding of act. The per se rule is a harsh rule. The Commission would be well advised not only to exercise caution in extending the rule to new forms of conduct, but also to exercise a high degree of care to apply the rule only when the subject conduct has been well established to have occurred.

## 2. Alleged Restraints on Nonprice Advertising

With respect to restrictions on nonprice advertising, I agree with the majority that CDA's actions must be evaluated under the rule of reason, which requires a showing of anticompetitive effects. Applying the rule of reason, I find no liability, even assuming that CDA does restrain nonprice advertising. An analysis of the evidence, however, puts even that assumption in question.

The basic CDA prohibition on nonprice as on price advertising is against false and misleading advertising, and again CDA relies on California statutes to define what is false and misleading. Although a pattern of enforcement actions might demonstrate that an association has twisted a legitimate rule to anticompetitive purposes, the examples cited by the majority are not sufficient to show such a pattern.

The majority asserts that CDA proscribes a "vast" range of nonprice advertising, Slip Op. at 25, but does not support this conclusion with a vast array of evidence. As we saw earlier, the restriction on advertising appears to be Section 10 of the CDA Code of Ethics, which on its face prohibits only false and deceptive advertising. The issue is whether CDA applied the facially valid rule in such a way as to stifle truthful and nondeceptive advertising.

Testimony by CDA officials is consistent with the goal of discouraging deception.<sup>18</sup> According to Dr. Kinney, a member of the CDA Judicial Council, the council "look[s] at the total ad, and attempt[s] to determine whether the ad in its entirety would be misleading to a prudent person or not." Tr. 1335, 1339. In doing so, he said: "We rely on the state's Dental Practice Act, the Business & Professions Code to help us determine whether or not the ad is misleading in any material respect." *Id.* A second CDA official, Dr. Nakashima, provided a similar account of CDA's enforcement standards. He also said that CDA's Judicial Council "look[s] at the whole ad in its entirety" to make a determination whether it is "false and misleading in any material respect." Tr. 1444. He also said that the organization relies on state law for guidance in determining whether an ad is false or misleading and confirmed that Section 1051 of the California Code of Regulations and Sections 651 and 1680 of the California Business and

<sup>18</sup> Their testimony also is consistent with the Commission's policy on deception. See Commission Policy Statement on Deception, Cliffdale Associates, Inc., 103 F.T.C. 110 (1984) (Appendix, at 176).

Professions Code were the state laws on which it relied. Tr. 1447.

It is not clear how the majority reconciles this testimony with its conclusion that "[t]he nonprice advertising CDA proscribes is vast." Slip Op. at 25. Before leaping to such a conclusion, the Commission should make at least minimal findings of fact regarding the scope of the advertising prohibitions imposed by CDA (as distinguished from the component societies, which were not charged in the complaint, and with appropriate reference to the basis in state law for any such restrictions).

The majority cites Advisory Opinion 8 to Section 10 of CDA's Code of Ethics, which provides:

Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect.<sup>19</sup> (Emphasis added.) (CX 1484-Z-49.)

The majority does not parse the language of the advisory opinion, but asserts that "[i]n practice, CDA prohibits all quality claims." Slip Op. at 25. It cites a 1992 letter from MARS to the Orange County Dental Society, in which the committee recommended denial of an application for membership in part because of the use of the words "quality dentistry." CX 387-C. As with many of the letters from MARS regarding an application, the factual background is not fully explained. For example, it is unclear whether the dentist in question had an opportunity to provide information

<sup>19</sup> Section 1052 of the Regulations issued by the California Board of Dental Examiners provides:

Any advertisement must be capable of substantiation, particularly that the services offered are actually delivered and at the fees advertised. RX 136-E.

to substantiate the claim.<sup>20</sup> If the dentist was given the opportunity to substantiate the claims but was unable to do so, the action might be seen in a different light. Unexplained, this decision is subject to serious question.

The majority cites two other MARS letters discussing the definition of falsity in Advisory Opinion 2(c) of the CDA Code and Section 651(b)(3) of the California Code (defining as false a statement that "[i]s intended or is likely to create false or unjustified expectations of favorable results"). RX-138A. In a 1992 letter to the Southern Alameda County Dental Society, MARS stated that the advertising claim that "[w]e are dedicated to maintaining the highest quality of endodontic care . . ." appeared to be inconsistent with Section 2(c). CX-1083-C. Similarly, in a letter to the San Francisco Dental Society, MARS said that the claims "improved results with the latest techniques" and "latest in cosmetic dentistry" were inconsistent with 2(c) and unverifiable. CX-306-C.<sup>21</sup> It is not clear whether the dentists in question were given the opportunity to substantiate the claims. For example, the claim of "improved results with the latest techniques" might be proved with statistical evidence. If such a claim were made by a dentist without such evidence, the advertisement might well be

<sup>20</sup> The reference to "quality dentistry" is one of several claims discussed in the MARS letter, and it appears that the committee's action was based partly on a finding that the dentist in question advertised that she was a member of the ADA when she was not. CX 387-B.

<sup>21</sup> In footnote 6 at page 10, the majority cites four other CDA actions based on this provision, all of which raise the same substantiation questions. Indeed, one of the letters is much like a Commission deceptive advertising decision, and it demonstrates that preventing unsubstantiated, indeed, in this case, false claims was precisely CDA's concern. Exhibit CX-478, cited by the majority, reflects a decision of the CDA Judicial Council that the claim "laser dentistry is revolutionizing dental care" was false because "laser dentistry is not revolutionary" and created unjustified expectations. See also CX-932 (claim of "the latest techniques"); CX-115 (claim of "lots of" experience); CX-963 (claim of "highest infection control standards").

deceptive. Unexplained, these two letters are open to serious question.<sup>22</sup>

The majority also concludes that CDA suppresses claims of superiority or guarantees. Slip Op. at 26. The majority does not address the role of the state legislator of California in prohibiting such claims. Slip Op. at 26. Section 1680(i) of the California code defines "unprofessional conduct" by a person holding a dental license to include the following:

The advertising of either professional superiority or the advertising of performance of professional services in a superior manner. This subdivision shall not prohibit advertising permitted by subdivision (h) of Section 651.

CDA has interpreted this statutory ban on claims of professional superiority to prohibit advertising implying that a dentist practices superior sterilization practices. See CX-671-A (claim that "all of our handpieces (drills) are individually autoclaved for each and every patient" said to violate Section 1680); CX-43-B (claim of "state-of-art

<sup>22</sup> In footnote 25 at page 36, the majority suggests that my interest in further factual inquiry is misplaced, citing six examples to show that "MARS was not concerned with any surrounding circumstances" when it wrote to the individuals. The record as a whole contains enough evidence of CDA's concern with surrounding circumstances to justify further factual inquiry. I do not quarrel with the evidence the majority cites, only with their failure to weigh explanatory and probative conflicting testimony and with their failure to consider the possible benefits of CDA's conduct. I have identified a number of such instances, observing, for example, in the discussion below that an implied claim of more effective sterilization may be deceptive. See, e.g., CX-394 (claim of "highest standards in sterilization"); CX-780 (claim of "modern sterilization"); and CX-557 (claim that "we guarantee all dental work for 1 year"). Common sense and the Commission's policy regarding deceptive advertising provide a basis for anticipating that these particular interpretations may prove to be justified. Because such claims account for a significant number of CDA enforcement actions, further inquiry would not be out of line. Indeed, it appears to be the more responsible course of action.

sterilization" said to violate Section 1680).<sup>23</sup> Enforcement of a prohibition against truthful superiority claims certainly can pose competitive dangers, because comparison among competitors is well recognized as a useful function of advertising.<sup>24</sup> It is possible, perhaps even likely, that these CDA letters crossed the line, but it would be useful to explore the issue somewhat further before condemning CDA.

For example, a claim that a dentist sterilizes drills for each patient may be literally true, but it also may imply a claimed distinction from other dentists (i.e., other dentists do not do so).<sup>25</sup> If all dentists routinely sterilize their drills between patients, as one might hope, such an implied claim might be deceptive. Similarly, the "state of the art sterilization" claim might be read to imply that other dentists use ineffective or less effective sterilization techniques, and that may not be true.<sup>26</sup> A review of some of the Commission's own deceptive advertising cases reveals that these interpretations

<sup>23</sup> In footnote 6 at page 10, the majority note a number of additional claims of the same sort. See CX-394 (Dr. Go, 1993); CX-360 (Foroosh 1986); CX-43 (Dr. Baron 1993); CX-780 (Dr. Norzagaray 1992); CX-718 (Mickiewicz and Rye, 1992); CX-1026 (Dr. Tracy 1992); CX-605 (Dr. Lerian 1993).

<sup>24</sup> See FTC Statement of Policy in Regard to Comparative Advertising, FTC News Summary No. 38 (August 3, 1979) ("Comparative advertising encourages product improvement and innovation, and can lead to lower price in the marketplace.").

<sup>25</sup> The Commission has held that truthful statements regarding the attributes of a product or the nature of services may convey implied claims. See Commission Policy Statement on Deception, Cliffdale Associates, Inc., 103 F.T.C. 110 (1984) (Appendix, at 176).

<sup>26</sup> Similar interpretations appear in Commission cases. For example, the Commission has alleged that implied superiority claims were made for hearing aids that were advertised as incorporating technological advance. United States v. Dahlberg, Civ. No. 4-94-CV-165 (D. Minn. Nov. 14, 1995) (consent decree); United States v. Beltone Electronics Corporation, Civ. No. 94-C-7561 (N.D. Ill. Dec. 21, 1994) (consent decree).

are not far-fetched.<sup>27</sup> It might be useful to explore the issues in greater depth.

Section 1680(1) of the California Code defines unprofessional conduct by dentists to include the following:

The advertising to guarantee any dental service, or to perform any dental operation painlessly. This subdivision shall not prohibit advertising permitted by Section 651.<sup>28</sup>

CDA has enforced this statutory prohibition against guarantees. See CX-668-C and CX-557-C (claim that "we guarantee all dental work for 1 year" said to violate Section 1680(1)); CX-497-C (claim of "crowns and bridges that last" said to imply guarantee in violation of Section 1680(1)). The claim that "[w]e guarantee all dental work for 1 year" appears to violate Section 1680(1) of the Dental Practice Act, which defines "unprofessional conduct" to include "the advertising to guarantee any dental service." CX-668. It is not clear whether the claim was a money-back offer if the dental work failed within one year, which might be true, or whether the claim was that all dental work will be perfect for at least one year, which seems unlikely. If the claim is limited to a money-back offer, then prohibiting such advertising may be anticompetitive. The majority does not

<sup>27</sup> The Commission has found or alleged in a variety of contexts that express and truthful claims have conveyed implied claims of superiority and that some of these implied claims were deceptive. See e.g., Kraft, Inc., 114 F.T.C. 40, 121, 128-32 (1991), aff'd sub nom., Kraft, Inc. v. FTC, 970 F.2d 311 (7th Cir. 1992); Bristol-Myers Co., 102 F.T.C. 21, 328-48 (1983), aff'd sub nom., Bristol-Myers Co. v. FTC, 738 F.2d 554 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985); see also, e.g., United States v. Egglands Best, Inc., (E.D. Pa. Mar. 12, 1996) (consent decree); Archer-Daniels-Midland, Docket C-3492 (Apr. 20, 1994) (final decision and order).

<sup>28</sup> Someone more flippant than I might suggest that prohibiting claims of painless dental operation is clearly justified because such claims are so obviously deceptive. To its credit, the majority does not challenge this provision.

discuss whether there might be a reason to require disclosure of the nature or terms of the guarantee.

The majority suggests that CDA has restricted advertising claims such as an offer of "gentle" care, although its restriction may be less sweeping than those of local societies. CDA witnesses said that CDA does not restrict claims such as "gentle" dentistry. Tr. 1343-46 (Dr. Kinney, member of CDA Judicial Council). Indeed, in 1993, CDA advised the local societies that the state Board regarded "gentle" as acceptable advertising. Tr. 1466 (Mr. Nakashima); RX-56. Because local societies were not charged in the complaint and because their conduct cannot be attributed to CDA, the reliance by the Administrative Law Judge and by the Majority on those actions is misplaced.

Finally, the majority finds that in 1984, CDA adopted a resolution that "solicitation of school children on any private or public school ground(s) is deemed not to elevate the esteem of the dental profession." CX 1115-A. My initial reaction to the CDA resolution is to question whether it expresses a point of view over which the majority really wants to quibble.<sup>29</sup> Second, in adopting the resolution, CDA cited and relied on Section 51520 of the California Education Code, which prohibits teachers or others from soliciting contribution from school children for organizations not under the school's control.<sup>30</sup> Perhaps CDA has enforced the

<sup>29</sup> Even assuming the resolution refers only to solicitation of dental business, to join the majority's implicit endorsement of such behavior would not be a decision I would like to explain to my mother.

<sup>30</sup> Section 51520 provides:

During school hours, and within one hour before the time of opening and within one hour after the time of closing of school, pupils of the public school shall not be solicited on school premises by teachers or others to subscribe or contribute to the funds of, to become members of, or to work for, any organization not directly under the control of the school authorities,

resolution in a manner that is overly broad, but the evidence to that effect is also thin.

After considering the evidence, I cannot join the majority's broad characterizations of CDA's actions. CDA's Code of Ethics on its face prohibits only false and deceptive advertising, and the case turns on how CDA has applied this legitimate principle. In evaluating CDA's actions, I would explore more fully the benefits to consumers, if any, of each of CDA's requirements and weigh the countervailing burden on advertisers. In turn, I do not offer a blanket endorsement of CDA's actions, the competitive effects of which merit examination, but rather suggest that the analysis of those actions should be based on a recognition that prevention of deceptive advertising may benefit consumers.

### III.

CDA's restrictions on advertising appear to be parallel to and no broader than restrictions imposed by the California legislature by statute. The majority does not compare CDA's actions to the state code nor does it suggest that CDA attempted to expand the statutory definitions. Instead, the majority suggests that because CDA did not "seriously attempt" to ascertain the California Board of Dentistry's interpretation of the "proper scope of state law," CDA lacks a basis for understanding state law and cannot claim that CDA is "furthering the State's current policy choice." Slip Op. at 46. To the extent that a statute or regulation is clear on its face, concern about dubious or incorrect interpretations seems misplaced. The majority does not identify any lack of clarity in the state law, nor can I. Any suggestion that CDA acted inconsistently with the state laws also is unsupported. CDA frequently relied on the plain language of state statutes and regulations in its enforcement actions, and CDA officials

[excluding charitable organizations approved by the school board] . . . .

testified that the association modified its code of ethics to maintain consistency with state law.<sup>31</sup>

The majority speculates that the Board may not be enforcing its rules because of concern about a 1989 memorandum prepared by a supervising attorney in the Legal Services Unit of the California Department of Consumer Affairs and discusses that memorandum at considerable length. Slip Op. at 43-44. This inference is highly questionable given that the California state legislature amended Section 651 of the California Code (quoted in part in footnote 4 above) in 1990 and again in 1992. If the legislators had wanted to adopt the contents of the memorandum, they had the opportunity and apparently did not choose to do so.

The majority's speculation that the Board of Dental Examiners has decided not to enforce its regulations is undercut by evidence from the Board itself. Specifically, in 1992, the state Board prohibited the use of the word "gentle" in advertising, RX-54-A, until the CDA persuaded it that such advertising was appropriate. RX-55. In acknowledging the change to CDA, the state Board of Dental Examiners attached a document summarizing its enforcement position on several issues, revised as of March 8, 1993. RX-56A, B. That 1993 summary does not support the view of the majority that the 1989 memorandum caused the Board of Dental Examiners to refrain from enforcement. In addition, Dr. Nakashima testified that he called Dr. Yuen, the president of the California State Board of Dental Examiners, the night before his testimony and confirmed that the Board considers its rules to be valid and enforceable, but that it operates under tight budgetary constraints. Tr. 1468-69. Of course, this is hearsay, but no objection was made to Dr. Nakashima's testimony, which appears on point and

<sup>31</sup> According to the testimony of Dr. Abrahams, who served on CDA's Judicial Council, the CDA amended its code of ethics frequently to keep it consistent with the state dental practice act. Tr. 851.

probative. Nor did complaint counsel introduce testimony or other evidence contradicting the hearsay.

I agree with the majority that CDA is not protected by the state action doctrine. Quite apart from the state action doctrine, however, a factual question arises that deserves at least to be addressed regarding what effect CDA actions, as distinct from state law, had on competition in the market for dental services. The majority states that in the absence of state enforcement of state statutes, it was "CDA, not California, that tampered with the workings of the market for dental services." Slip Op. at 46.<sup>32</sup>

The record, however, does not establish that CDA, as opposed to the state of California, influenced the advertising of dentists. Some dentists who advertised were told by CDA that their advertisements violated state law. The record simply does not reflect whether those dentists changed their advertising and, if so, whether it was because they did not want to offend CDA or because they did not want to violate state law.

State laws may have had an *in terrorem* effect even in the absence of vigorous state enforcement. Section 652 of the California Code provides that violations are punishable by revocation of the violator's professional license by the relevant licensing board, and Section 652.5 provides that any violation is a misdemeanor and is punishable by "imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars

<sup>32</sup> The Commission cites *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 17 F.3d 295 (9th Cir.), *cert. denied*, 115 S.Ct. 66 (1994). In that case, the court found that the only anticompetitive injuries resulted from government action and hence that a private party could not be held liable. That factual conclusion on causation of injury does nothing to establish that CDA was the source of the advertising restriction here. The second case the Commission cites, *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612 (6th Cir. 1982), held that the actions of a state dental board were protected by the state action doctrine. Again, that holding provides little insight into the resolution of this case.

(\$2,500), or by both the imprisonment and fine." 1 Deerings California code § 652.6 (1995 Supp.). A 1994 amendment makes clear that punishment can include both imprisonment and fine, which suggests that this was not some long forgotten law. *Id.*

Respect for the law and a willingness to conduct oneself in accordance with the law can be powerful incentives regardless of the resources devoted to law enforcement. In the absence of evidence regarding the relative impact of state law versus CDA, it seems questionable to infer that dentists feared the CDA instead of the state of California.

Arguably, the majority could find liability under Section 5 of the FTC Act based on conclusions that the California law has anticompetitive effects and that CDA had encouraged compliance with California law, without finding that CDA's conduct alone had anticompetitive effects. The majority has not so held or even suggested such a theory of liability. In view of the absence in the record of evidence showing adverse effects on competition, I do not address the merits of such a theory either.

#### IV.

Even assuming that the preponderance of the evidence establishes that CDA engaged in each and every variation of an advertising restraint analyzed under the rule of reason and that each such restraint is unjustified, I still would dissent from the opinion of the majority because of the even greater weaknesses in the remaining elements of the case. The Commission reverses the finding of the Administrative Law Judge that CDA has no market power and concludes instead that CDA has market power. The fundamental difficulty with this conclusion is that it is not supported by evidence. Complaint counsel made no effort to try the case on a rule of reason theory and did not introduce testimony or documents to establish the elements of a rule of reason case. To put the matter in perspective, complaint counsel proposed 949 findings of fact and conclusions of law with respect to this

proceeding, but they proposed only one finding, Proposed Finding 570, relating to market power.<sup>33</sup> The Administrative Law Judge correctly rejected this proposed finding. I agree with the finding of the Administrative Law Judge that CDA lacks market power.<sup>34</sup>

Complaint counsel's Proposed Finding 570 ("CDA has market power") is based entirely on the testimony of Dr. Knox, CDA's expert economist. According to Proposed Finding 570, because CDA members as a group face a downward sloping demand curve for dental services and assuming hypothetically that CDA members act together,<sup>35</sup> they could exercise some degree of market power. Complaint counsel's hypothetical does not suffice to rebut Dr. Knox's economic testimony that CDA's enforcement of its Code of Ethics "has no impact on competition in any dental market in California." Tr. 1633.

The ALJ found that dental patients are relatively price sensitive because patients pay for their own care, and most dental care is not urgent. IDF 321. To demonstrate that

<sup>33</sup> Complaint Counsel's Proposed findings 540 to 578 purport to set forth Complaint Counsel's full economic analysis of the case.

<sup>34</sup> The conclusion of the Administrative Law Judge that CDA lacks market power rests on the finding that there are no barriers to entry. ID at 76. The Administrative Law Judge also concluded that complaint counsel failed to introduce evidence sufficient to show that CDA members could act together to raise prices or reduce output and failed to introduce evidence of relevant geographic markets. ID at 76.

<sup>35</sup> Dr. Knox testified that market power is the ability to raise prices above the competitive level. Tr. 1689. He suggested that with a downward sloping demand curve, by definition, a group of suppliers with market power could raise prices above a competitive level. Tr. 1690. Complaint counsel elicited from him the statement that dentists individually and collectively face a downward sloping demand curve. Tr. 1691. In response to a hypothetical question by complaint counsel, he said that assuming that CDA members collectively raised the price of their services, the total quantity of services provided by CDA members would decline. Tr. 1694.

CDA members profitably could impose a price increase, it would be necessary to show that other dentists could not increase their output and that new dentists could not enter in sufficient numbers to defeat such a price increase. Complaint counsel made no such showing, and the proposed finding was correctly rejected.

To establish market power, relevant antitrust product and geographic markets must be identified. Respondent's expert economist, Dr. Knox, testified that dental services could constitute a relevant product market. Tr. 1689. The majority adopts the dental services product market and defines dental services as those services provided by dentists licensed under the California Code. Slip Op. at 31. I agree that the relevant product market appears to be the provision of dental services.

The record provides relatively little information on the relevant geographic market(s) for dental services in California. Some evidence suggests that the relevant geographic markets are local. Respondent's expert, Dr. Knox, testified that in his opinion, the entire state is not a market and that the relevant markets are smaller than the state. Tr. 1642. Mr. Christensen, whose experience in the California dental advertising market is discussed above, said that a single dental practice draws from the closest 20,000 or 30,000 households. Tr. 655. In his view, people do not travel far to visit a dentist. Tr. 637.

Although the record suggests that the relevant geographic markets are smaller than the state, no specific geographic markets were urged by complaint counsel, and none is adopted or discussed in the majority opinion. The record evidence suggests that individual dentists draw most of their patients from the area immediately surrounding their offices, but that does not conclusively establish the size of the relevant geographic markets. For example, in urban areas, the practice areas of some dentists may overlap with those of other dentists, which in turn overlap with still others. In this fashion, small competitive zones may be linked into a larger

geographic market. These geographic market issues, however, were not developed in the record.

The majority says that over 90 percent of the dentists "in at least one region" are members of CDA, citing CX-1433. Slip Op. at 31. Let us consider this single piece of evidence about a single possible geographic market. Exhibit CX-1433 is a letter not from CDA but rather from the executive secretary of the Mid-Peninsula Dental Society, which includes the California cities of Menlo Park, Palo Alto, Portola Valley, Los Altos and Mountain View. The letter, which appears to be a form letter with which to send out membership applications, says nothing about whether the dentists in the region compete with one another. Nothing in the record establishes the author's expertise in defining competitive markets, and nothing in the letter suggests that the area covered by the Mid-Peninsula Dental Society is a relevant antitrust market. In sum, although dental services appears to be a product market, there is no basis in the record for defining any geographic area as a relevant market. Complaint counsel's failure to prove a relevant antitrust market alone is sufficient to dispose of the allegations of market power.<sup>36</sup> See Adventist Health System/West, 5 Trade Reg. Rep. (CCH) ¶ 23, 591 (April 1, 1994); Capital Imaging Associates v. Mohawk Valley Medical Ass'n, 996 F.2d 537, 547 (2d Cir.), cert. denied, 114 S.Ct. 388 (1993) (defining local radiology market in rule of reason analysis).

The majority concludes that "where there are significant barriers to entry," market share alone may be relied on as an indicator of market power. Slip Op. at 31. Since no geographic markets have been defined, it is not possible to

<sup>36</sup> It is even more elementary that once a market has been established, some conduct affecting competition in that market must be identified before liability can attach. Even assuming that the evidence is sufficient to show that the area served by the Mid-Peninsula Dental Society is a relevant geographic market, none of the alleged restraints on nonprice advertising discussed in the opinion of the majority (Slip Op. at 25-27) was directed to dentists in this area.

develop any market share data or other pertinent concentration statistics. Nonetheless, I agree with the general proposition that the presence or absence of impediments or barriers to entry is important to, and may be dispositive of, the competitive analysis. See, e.g., United States v. Baker Hughes, Inc., 908 F.2d 981, 987 (D.C. Cir. 1990); United States v. Waste Management, Inc., 743 F.2d 976, 983 (2d Cir. 1984); United States v. Gillette Co., 828 F. Supp. 78 (D.D.C. 1993).

Dr. Knox, the respondent's economic expert, testified that the basis for his opinion that CDA's enforcement activities have no impact on competition in any dental market in California is that "CDA cannot erect any barrier to entry to any dental market in the state of California." Tr. 1633-34. He said that in his view, the only barrier to entry in this market is the need to acquire a license issued by the California Board of Dental Examiners. Tr. 1634. In his opinion, the facts that a dentist must attend dental school to sit for the exam or that he or she must acquire or lease an office and equipment do no amount to entry barriers. Tr. 1636-40.<sup>37</sup> The Administrative Law Judge adopted Dr. Knox's view that there are no barriers to entry in the provision of dental services in California.<sup>38</sup> ID at 76.

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<sup>37</sup> A dentist opening a practice must buy equipment, and Dr. Hamann pointed out that it is possible to equip and operatory with used equipment for as little as \$2500. A dental school graduate with access to significant capital; such as Dr. Hamann, may purchase two established practices at the start of a career, but nothing in the record suggests that every graduate needs to take that high-cost approach to entry. Used equipment or rental equipment is available. Office space can be leased.

<sup>38</sup> The majority criticizes the Administrative Law Judge for his finding that there are no "insurmountable" barriers to entry in dental services. Slip Op. at 31-32. Although the rhetorical flourish of the Administrative Law Judge is an overstatement of the elements necessary for liability, the Initial Decision does not appear to state or rely on a novel entry standard. Rather, it appears appropriately to focus on whether CDA dentists profitably could raise prices without attracting new entry.

The majority concludes that entry into the California dental market is difficult. Slip Op. at 32. The majority finds that "it can take 18 months to 2 years for a practice to meet current expenses, and between 5 and 10 years to amortize the debt." Slip Op. at 32. Contrary to the inference drawn by the majority, these findings suggest that entry into a California dental services market is possible because lenders are ready, willing and able to extend the credit needed to enter.<sup>39</sup>

A dentist who enters the market has an impact on competition when he or she starts serving patients, not when current expenses are met and not when debt has been amortized. Indeed, if the majority intends to set a new standard to this effect for evaluating the difficulty of entry, we can expect some radical changes in enforcement. Nor does a dentist need to open a separate practice to enter the market. A new graduate from dental school who works as an associate in an established practice contributes to the output of dental services and has entered the relevant market.

The majority cites the testimony of three dentists (Dr. Harder, Dr. Miley, and Dr. Hamann) to support its finding that entry is difficult. Slip Op. at 32. Dr. Richard Harder, a witness called by complaint counsel, said that the first step in establishing a new practice is to identify a suitable area in which to practice and that an entrant then needs to lease or buy equipment. Tr. 297-98. He said that a dental equipment supplier "was helpful in teaching me some of the ropes" and that the cost to equip an office was \$15,000. Tr. 297-99. He estimated that it takes at least 18 months to break even. Tr. 300. Dr. John Miley, another witness called by complaint counsel, thought that entry was difficult because in his opinion the state was "over supplied with dentists." Tr. 329. He said that many young dentists graduate from school with debts of \$50,000 to \$100,000 and that it costs an

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<sup>39</sup> The record contains testimony that it is less expensive to enter the dental services market than to buy a franchise hamburger restaurant. Tr. 1234-35.

additional \$50,000 to \$75,000 to establish a practice. Tr. 330-331. A third witness called by complaint counsel, Dr. Hamann, testified that he and his wife borrowed \$400,000 for her to acquire two established dental practices and to provide the "working capital" to operate them. Tr. 760. He testified that he acquired used dental equipment to furnish six operatories for the practice, at a cost of \$2500 to \$4000 per operatory (although new equipment might cost \$15,000 to \$20,000 per operatory). Tr. 761.

Drs. Harder, Miley and Hamann all testified that they (or in Dr. Hamann's case, his wife) successfully entered the California dental services market. Their experiences suggest that entry is not difficult. None of the three witnesses provided even one anecdote about a licensed dentist who wanted to practice in California but was deterred by the difficulty of entry.

Dr. Hamann's testimony indicates that entry is not only possible, but also that it can be highly lucrative. Dr. Hamann is a physician who managed the practice for his wife, Dr. Hamann, who is a dentist. After purchasing two dental practices for about \$400,000, they undertook an "aggressive" marketing program. Tr. 806. Although Dr. Hamann did not use price or comparative advertising in her practice, her husband said that her marketing campaign was the "[m]ost aggressive I've ever seen." Tr. 790. The Hamanns sold the practice after eight years, by which time it was earning \$1,500,000 per year in gross revenues. Tr. 808. Dr. Hamann testified that after the fifth and sixth year, his wife was earning from \$300,000 to \$500,000 in profits after paying him \$100,000 per year to manage the practice. Tr. 808. It should be observed that marketing success story apparently was achieved well within the bounds of CDA's rules. Dr. Hamann was an active member of the CDA and the Tri-County Dental Society and served as a delegate to the CDA. Tr. 765-66.

Dr. Harder graduated from dental school in 1979 and worked as an associate dentist for Dr. Senise in Glendora,

California. Tr. 245. Because of the long commute, he left that practice in 1981 to establish his own practice in Laguna Hills. Tr. 247. In 1986, he stopped practicing in Laguna Hills and opened an office in Irvine, California. Tr. 250. Dr. Harder's success in opening and subsequently moving a practice provides evidence that the cost of opening an office is not a barrier to entry.

Dr. Miley's concern was that students graduate from dental school with debts. That alone does not prevent entry. If anything, the availability of credit to dental students suggests that a steady flow of new entrants into the profession will continue. Dr. Miley's testimony that California is oversupplied with dentists supports the conclusion that the cost of education has not choked off the flow of potential entrants. If anything, it supports the view that entry is easy. No doubt, entry into the dental services market takes talent, hard work and perseverance. But that is not the kind of difficulty cognizable in an antitrust analysis.

The majority suggests that there is "little doubt" that CDA can enforce its rules because advertising is observable and because dentists place a high value on CDA membership. Slip Op. at 30. The majority states that there is no need to "quantify this benefit econometrically," because when faced with the choice of membership or advertising, dentists "overwhelmingly chose the former." Slip Op. at 30.

Econometrics is not necessary to establish anticompetitive effects; simple evidence would do. The majority's rhetoric glosses over the absence of evidence concerning the actual competitive effect of CDA's activities. The phrasing of the choice as one between membership and advertising assumes, without supporting evidence, that dentists in California, including members of CDA, do not advertise. It further assumes, again without benefit of evidence, that the cause of any reluctance to advertise is CDA. The testimony of Dr. Hamann that his wife undertook the "most aggressive" marketing campaign that he had ever seen, while remaining a member in good standing of CDA, and the testimony of Mr.

Christensen about advertising by clients of his advertising agency raise a question whether dentists do face a choice between advertising and membership. The hypothesis that some or even many dentists do not advertise, even if true, does not establish a link between lack of advertising and membership in CDA.<sup>40</sup>

CDA membership is not essential to a successful dental practice in California. CDA offers benefits to its members, but those benefits are readily available from other sources. The Initial Decision identifies CDA's two annual scientific sessions as the "most visible and tangible membership benefit." IDF 101. These sessions are a convenient way for dentists to satisfy their state-imposed continuing education requirement. IDF 105. CDA members attend for free; nonmembers must pay a registration fee to attend. IDF 104. Continuing education also is available from other sources. Tr. 803. CDA members receive CDA publications at a lower subscription rate than nonmembers. IDF. 107.

CDA lobbies the California legislature. IDF 70-85. To the extent that CDA lobbies the state successfully on behalf of dentists, the benefits apparently would flow to members and nonmembers alike. Some other benefits of CDA membership include a marketing program to enhance the image of CDA and dentists, a program promoting direct reimbursement instead of insurance company plans, twice-a-year seminars on the non-clinical aspects of dental practice, and a peer review program as an alternative to litigation to resolve customer complaints. IDF 106, 89, 92, 98.

<sup>40</sup> The majority responds to my questioning on this point with more citations to CDA documents. See Slip Op. 30 n.21. Even if a dentist agrees to comply with a letter suggesting that an advertisement violates state law, the CDA documents do not show what motivated the change of heart. For that, we must look to documents or testimony from the dentist. The majority cites one such letter. Exhibit CX-480 is a letter from Dr. Jenkins agreeing to change an advertisement that the CDA Judicial Council found to be misleading, stating his disagreement with that position. The letter does not illuminate why he decided to comply.

CDA operates several for-profit subsidiaries. One subsidiary offers professional liability insurance to CDA members. IDF 109. Another for-profit subsidiary is an insurance broker for CDA members and offers CDA members a revolving line of credit, financing for dental office equipment, discounts on long distance telephone rates, a VISA gold card and so forth. IDF 117. Dr. Martin Craven, a past president of CDA, testified that the primary benefit of association membership was social, not financial. Tr. 1200. He testified that other insurance companies offer professional malpractice insurance at lower rates than CDA's subsidiary. Tr. 1401.

It is one thing to conclude that CDA offers its members some benefits (presumably no one joins unless value is perceived), but it is quite another to conclude that CDA membership is so valuable that the association has a "stranglehold on the profession," as the majority suggests. Slip Op. at 30. The benefits that CDA offers to its members are significant enough to persuade them to pay their dues and perhaps to participate in the association's activities. None of the benefits offered by CDA appears to be uniquely available from the association, and none appears to be essential to the successful practice of dentistry. One telling point about the commercial importance of CDA membership is how infrequently it is used in dentists' advertisements. The CDA filed a one and one-half inch thick appendix of dentists' ads in the yellow pages, very few of which announce CDA membership.

The evidence does not support the conclusion that CDA can control the price and output of dental services in California. The majority relies on the single fact that approximately 75 percent of California dentists are members of CDA to support its finding of market power. Almost certainly, the state of California is not a relevant geographic market for dental services. But even hypothesizing a relevant geographic market with membership similar to that statewide, entry could undercut any claimed ability to

exercise market power, and the evidence suggests that entry is, in fact, easy.

The weakness of the majority's anticompetitive effects story is reflected in the majority's final observation that it is "implausible at best" that dentists would move to California to advertise. Slip Op. at 32. If CDA has successfully restrained competition in California by limiting advertising, why would not the usual economic incentives of the free market work in this market? If CDA had successfully controlled its members to halt advertising, why would not the other 25 percent of dentists in California who are not CDA members expand their practices by advertising, and why would not newly licensed dentists or dentists from other areas step in to take advantage of the fact that CDA members had voluntarily tied their own hands in competition to attract patients? The Commission finds it "implausible at best" that this would happen. A better conclusion is that it is "implausible at best" that CDA has had any significant adverse effect on competition.

The opinion of the majority has troubling implications that go well beyond this case. The first of these is its use of the per se rule. There is good reason to apply the per se rule more sparingly than the majority has in this case. Although I would apply the per se rule to prohibitions on price advertising, I would evaluate under the rule of reason disclosure and substantiation requirements for price as well as nonprice advertising to ascertain whether those requirements are reasonable efforts to cure deception. The majority's failure seriously to attend to the possible justifications for CDA's requirements may operate to the detriment of consumers. As recognized in the analytical approach embodied in the Commission's late opinion in Mass. Board, consideration of efficiencies is vital to good antitrust analysis. The per se rule, which dispenses with consideration of efficiencies, should be circumscribed accordingly.

Even assuming that CDA's advertising policies are broader or more burdensome than necessary to prevent deceptive advertising, the majority's rule of reason analysis is troubling. The startling failure to identify a geographic market before finding liability is one cause for concern. The majority's treatment of the entry issue is another. The case can be disposed on ease of entry alone. Not only is the evidence offered to suggest barriers to entry minute, but more importantly, the analysis the majority employs implicitly suggests the adoption of a new standard for evaluating barriers to entry. Unless the analysis of entry in this case is treated as an aberration, we reasonably can assume that the majority would find barriers to entry in almost any market we might imagine. It seems unlikely that the majority would apply the same loose test to barriers to entry in all cases, including merger cases under Section 7 of the Clayton Act, but only time will tell.

I dissent.

**OPINION OF COMMISSIONER ROSCOE B. STAREK, III,  
CONCURRING IN PART AND DISSENTING IN PART**

**In the Matter of**

**CALIFORNIA DENTAL ASSOCIATION**  
Docket No. 9259

I concur in the Commission's determination that respondent California Dental Association ("respondent" or "CDA") has violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, by promulgating and enforcing restrictions on truthful, nondeceptive advertising by its members. I concur as well in the Commission's findings that (1) CDA is subject to FTC jurisdiction; (2) CDA's adoption and enforcement of its policies restricting advertising by its members constitutes an agreement among competitors; (3) CDA's "state law" defense must be rejected; and (4) the Order appended to the majority opinion provides an appropriate remedy for

respondent's unlawful acts. Despite my conclusion that CDA's restrictions on both price and non-price advertising unreasonably restrain trade, I cannot join in the majority's startling decision to extend *per se* treatment to all agreements among competitors to restrain truthful, nondeceptive price advertising. Finally, what the majority styles as its "quick look" rule of reason approach to CDA's restraints on both price and non-price advertising<sup>1</sup> contains unnecessary and potentially confusing departures from the analytical structure set forth in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988) ("Mass. Board").

Instead of applying the framework established in *Mass. Board* for the systematic review of all horizontal restraints, the majority applies to CDA's price advertising restrictions a *per se* analysis, somewhat euphemistically labeling it "traditional."<sup>2</sup> Although the Supreme Court and the Commission have generally moved away from summary *per se* condemnation of horizontal restraints without some consideration of potentially relevant rule of reason factors,<sup>3</sup> my colleagues today breathe new life into the rigid and often overinclusive application of the *per se* rule. *Mass. Board* analysis, which faithfully synthesizes and applies the Court's post-*BMI* horizontal restraints jurisprudence, has been bypassed and marginalized so that even the most truncated consideration of relevant market conditions and potential competitive benefits of agreements restricting price advertising need never trouble the Commission again.

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<sup>1</sup> Slip op. at 32.

<sup>2</sup> *Id.* at 39 (citing *Mass. Board*, 110 F.T.C. at 604 n.12).

<sup>3</sup> See, e.g., *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984) ("NCAA"); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) ("BMI"); cf. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ("GTE Sylvania") (establishing the primacy of economic effects in the analysis of non-price vertical restraints).

As the majority acknowledges, had it followed a horizontal restraints analysis based on *Mass. Board*, the result in the present case would have been the same: CDA's advertising restrictions would have been condemned as unreasonable restraints of trade without an elaborate "full" rule of reason inquiry.<sup>4</sup> That result, however, would not have entailed the diminution in the relative clarity and coherence of FTC horizontal restraints analysis that we may surely expect to follow from the majority's reasoning in this case.

## I.

The majority's decision not to rely on *Mass. Board* analysis in this case is puzzling. In *Mass. Board*, the Commission condemned a state optometry board's regulations restricting several types of truthful, nondeceptive advertising, including the advertising of price discounts.<sup>5</sup> The factual and legal issues analyzed in that matter are therefore similar to those now before the Commission. Moreover, in *Mass. Board* the Commission set out a "structure for evaluating horizontal restraints" that is both consistent with the Supreme Court's teaching and, as the Commission observed in that case, "more useful than the traditional use of the *per se* or rule of reason labels."<sup>6</sup> Nevertheless, the majority sidesteps *Mass. Board* analysis in

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<sup>4</sup> It is well established that the rule of reason may be expeditiously applied in appropriate cases. See generally *NCAA*, 468 U.S. at 109-10 n.39 ("the rule of reason can sometimes be applied in the twinkling of an eye" (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981))).

<sup>5</sup> 110 F.T.C. at 604-07. Although the horizontal restraints at issue in *Mass. Board* were promulgated by a state board, the Commission found the state action doctrine inapplicable because the Commonwealth of Massachusetts had not clearly articulated a policy to displace competition with state regulation. *Id.* at 614. The Commission condemned the challenged advertising restrictions under Section 5 of the FTC Act because they met Sherman Act 1's definition of a "contract, combination . . ., or conspiracy, in restraint of trade . . ." *Id.* at 606-08, 610-11.

<sup>6</sup> *Id.* at 603-04.

favor of the *per se* and rule of reason "labels" it found wanting not that many years ago.

Presented with a challenge to a trade association's promulgation and enforcement of restrictions on price advertising among the association's members, the majority first selects a serviceable *per se* category: "[I]t is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws."<sup>7</sup> The majority finds that CDA's restrictions amount to the prohibition of truthful and nondeceptive price advertising<sup>8</sup> and equates that behavior with "a naked attempt to eliminate price competition."<sup>9</sup> The opinion's classification of the restraints imposed by CDA effectively brings the horizontal restraints analysis to an end. Rather than inquire into the actual competitive effect of CDA's advertising restrictions, the core of the majority's *per se* analysis reviews in general the evils associated with restraints on price advertising<sup>10</sup> and leads to the authoritative conclusion that "CDA's restraints on price advertising are thus illegal *per se*."<sup>11</sup> Thus is born a new category of *per se* unlawful restraints.

The opinion then proceeds to demonstrate that the same price advertising restrictions would have been condemned under the rule of reason.<sup>12</sup> Although I presume that this demonstration is for the benefit of benighted adherents of the

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<sup>7</sup> Slip. op. at 16.

<sup>8</sup> *Id.* at 17-19.

<sup>9</sup> *Id.* at 19.

<sup>10</sup> *Id.* at 19-23.

<sup>11</sup> *Id.* at 24.

<sup>12</sup> *Id.* at 24-38.

*Mass. Board* approach,<sup>13</sup> the exercise in fact tends to vindicate the use of *Mass. Board* in the first place.

## II.

The majority should have applied *Mass. Board* analysis in the present case not simply because it is apposite, but also because it -- and not the reinvigoration of the *per se* rule -- is consistent with the broad outlines of the past two decades of Supreme Court antitrust jurisprudence. The Commission's opinion in *Mass. Board* developed from a line of cases in which the Supreme Court sent the clear message that the analysis of a particular restraint of trade should be based on an understanding of the restraint's effect on competition. In cases including *BMI*, *NCAA*, and *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) ("*IFD*"), the Court signaled its dissatisfaction with the use of rigid, outcome-determinative categories.<sup>14</sup>

As the majority correctly notes, for purposes of determining the legality of a restraint under Section 1 of the

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<sup>13</sup> Whatever support a literal reading of one isolated sentence in *Mass. Board*, 110 F.T.C. at 607, lends to the majority's statement that the Commission "summarily condemned the price advertising restraints" at issue in that case, slip op. at 23, I cannot agree with my colleagues' conclusion that CDA's price advertising restrictions can therefore be declared *per se* illegal. The Commission did not reach its conclusion in *Mass. Board* by mechanically applying a *per se* rule to the Board's restrictions; rather, it proceeded through the truncated rule of reason approach set out earlier in that opinion. *Mass. Board*'s "summary" condemnation thus included an assessment of whether the restrictions were inherently suspect and an examination of efficiency justifications. 110 F.T.C. at 606-07.

<sup>14</sup> Just as *BMI*, *NCAA*, and *IFD* indicated the need for economic depth in the treatment of horizontal restraints of trade, so the earlier decision in *GTE Sylvania*, *supra*, announced the Supreme Court's abandonment of its rigid *per se* treatment of non-price vertical restraints. *GTE Sylvania*, *BMI*, and succeeding cases demonstrate the evolution of the Court's approach away from bright-line categories and toward the application of sophisticated economic inquiry.

Sherman Act, "the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition."<sup>15</sup> The rule of reason is the "prevailing standard" for assessing the effect on competition of most restraints.<sup>16</sup> Moreover, the Supreme Court has stated in the clearest possible terms that any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."<sup>17</sup> The rule of reason approach prevails because whenever antitrust analysis is too far removed from an inquiry into actual effects upon actual markets, the risks of overdeterrence rise dramatically. For this reason, *per se* rules are to be applied with the utmost circumspection.

As noted earlier, over the past two decades the Supreme Court has steadily diminished the scope of *per se* analysis in antitrust jurisprudence.<sup>18</sup> This evolution reflects the Court's increasing disposition to ground determinations of antitrust "harm" on actual effects on competition. The Commission's truncated rule of reason analysis in *Mass. Board* is quite consistent with that trend. Whatever the restraint, under *Mass. Board* there is at least some inquiry into its likely economic effect and into whether a plausible efficiency might merit a fuller weighing of the restraint's

<sup>15</sup> Slip op. at 14 (citing *NCAA*, 468 U.S. at 104; *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 691 (1982)).

<sup>16</sup> *GTE Sylvania*, 433 U.S. at 49.

<sup>17</sup> *Id.* at 58-59.

<sup>18</sup> See, e.g., *Northwest Wholesale Stationers* (rule of reason inquiry appropriate for some group boycott claims); *NCAA* (rule of reason analysis applied to agreement among competing college football teams to fix prices for all television broadcasts of their games); *BMI* (rule of reason analysis for agreement among thousands of competing songwriters to contract with a single entity to fix prices for performance rights to their songs); *GTE Sylvania* (rule of reason analysis to be applied to all vertical non-price restraints in the absence of market power).

procompetitive benefits against its anticompetitive consequences.<sup>19</sup>

There is no basis for concluding that the Supreme Court has swerved from the path charted in *BMI* and *NCAA* of requiring analysis -- even the "truncated" variety -- rather than the use of categories.<sup>20</sup>

### III.

The majority opinion asserts that "[a] *per se* category of violation may emerge as courts gain familiarity with the almost invariably untoward effects of a particular practice across economic actors and circumstances."<sup>21</sup> Then, quoting from *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982), the majority states that "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable"<sup>22</sup> -- i.e., it has declared the restraint *per se* unlawful.

<sup>19</sup> *Mass. Board*, 110 F.T.C. at 604.

<sup>20</sup> My reluctance to apply a *per se* approach to respondent's restrictions on price advertising is only heightened by the Supreme Court's "general reluctance" -- recognized by the majority, slip op. at 24 -- to apply a *per se* approach to codes of conduct of professional associations. See, e.g., *IFD*, 476 U.S. at 458; *United States v. Brown Univ.*, 5 F.3d 658, 671 (3d Cir. 1993).

<sup>21</sup> Slip op. at 15.

<sup>22</sup> *Id. Maricopa* is a textbook example of why structured case-by-case analysis is usually preferable to a *per se* rule. As one distinguished commentator put it:

The courts have repeatedly invoked the *per se* label without the faintest comprehension of the commercial functionality of the practice they were condemning. One need only go back as far as the *Maricopa County* case . . . . As this case demonstrates, if *per se*

But on what foundation rests the majority's conviction that CDA's restrictions on price advertising belong in the narrow group of practices that can be declared illegal without at least an initial inquiry into their reasonableness? If "[p]er *se* categories of unlawful economic activities . . . consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial redeeming virtues,"<sup>23</sup> how can the majority be confident that it has properly placed CDA's restraints on price advertising in such a category? Doesn't *per se* condemnation of CDA's price advertising restrictions sidestep the need to answer "the ultimate question" raised by each restraint of trade, *viz.*, "whether the challenged restraint hinders, enhances, or has no significant effect on competition"?<sup>24</sup>

If a determination of *per se* illegality means that a restraint has "almost invariably untoward effects . . . across economic actors and circumstances,"<sup>25</sup> then presumably one consequence of today's ruling is that the Commission will

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condemnation is made before understanding is achieved, understanding may never be achieved; the legal classification precludes the development of a trial record that would elucidate the challenged practice.

William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 Calif. L. Rev. 933, 936 (1987) (citation omitted).

Although *Maricopa* involved unreasonable restraints of trade, its broad application of the *per se* rule to physician agreements regarding price has frustrated an informed reexamination of provider combinations in an era of burgeoning managed care. It has been persuasively suggested that *Maricopa*'s unnecessarily broad *per se* rhetoric has contributed to the current overdeterrence of many potentially efficient combinations of health care providers. See, e.g., Clark C. Havighurst, *Are the Antitrust Agencies Overregulating Physician Networks?*, 8 Loy. Consumer L. Rep. (forthcoming 1996).

<sup>23</sup> Slip op. at 15.

<sup>24</sup> *Id.* at 14.

<sup>25</sup> *Id.* at 15.

feel no obligation to perform an analysis of particular market circumstances before condemning other restrictions on truthful, nondeceptive price advertising in a wide array of future cases. One court of appeals has observed that the Supreme Court has been more hesitant to apply a *per se* rejection to competitive restraints imposed in contexts where the economic impact of such practices is neither immediately apparent nor one with which the Court has dealt previously.<sup>26</sup> Thus, I question whether the Commission should establish a rule in future cases that restraints on truthful, nondeceptive price advertising -- even in markets to which the Commission has had no prior exposure -- are "beyond justification in the sense that any argument as to the harmlessness of the restraint, or any proffer of procompetitive justifications for the practice, will generally not be considered."<sup>27</sup> If CDA's restrictions on price advertising are unlawful -- as they have appropriately been held to be -- it is not because some of them fit into a "category." Rather, it is because a properly framed competition analysis, however truncated, shows that they -- together with CDA's restraints on non-price advertising -- lessen competition.

#### IV.

The majority also treats CDA's restraints on price and non-price advertising under a dubious variant of the "truncated" rule of reason.<sup>28</sup> Instead of asking the structured

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<sup>26</sup> *United States v. Brown Univ.*, 5 F.3d at 671.

<sup>27</sup> Slip op. at 15. Cases such as *BMI* and, for that matter, the case in which the Supreme Court set forth the classic articulation of the rule of reason -- *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918) -- illustrate the Court's longstanding reluctance to condemn uncritically arrangements that on their face more closely resemble "naked" price-fixing than do CDA's price advertising restrictions. See also cases cited *supra* note 18.

<sup>28</sup> Slip op. at 24-39.

series of questions posed by *Mass. Board*<sup>29</sup> a set of questions that lends itself flexibly to the appraisal of horizontal restraints -- the majority imports into its analysis issues that may or may not be relevant under a properly conducted *Mass. Board* approach.

The flexibility afforded by the *Mass. Board* framework serves, among other goals, the ends of judicial economy. In certain cases, evidence sufficient to support the condemnation of a horizontal restraint may fall short of what would have appeared in the record of a "full" rule of reason trial. For example, if the challenged restraint "appears likely, absent an efficiency justification, to 'restrict competition and decrease output,'"<sup>30</sup> and if there is no plausible efficiency justification for the practice, then a finding of illegality is appropriate even if market power (and other elements of "the full balancing test of the rule of reason"<sup>31</sup>) have not been established. On the other hand, in cases in which the restraint's likely anticompetitive effect is not apparent, or in which a proffered efficiency justification deserves a detailed examination, the full rule of reason approach -- including scrutiny of market power in many cases -- is necessary.

Nevertheless -- and despite language to the contrary in the opinion<sup>32</sup> -- the approach that the majority uses in place of *Mass. Board* makes a fairly elaborate assessment of market power a key element of its "quick look" approach. Although the Administrative Law Judge's anomalous determination with respect to market power<sup>33</sup> may have impelled the

<sup>29</sup> 110 F.T.C. at 604.

<sup>30</sup> *Id.* (quoting *BMI*, 441 U.S. at 20).

<sup>31</sup> *Mass. Board*, 110 F.T.C. at 604.

<sup>32</sup> Slip op. at 25 ("The anticompetitive effects of CDA's advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion . . .").

<sup>33</sup> Initial Decision at 76.

majority to discuss the issue at length, I am concerned that the majority opinion may be read to imply that an assessment of market power is a necessary part of the truncated rule of reason approach.

Let me be clear that I am by no means saying that the issue of market power should never play a role in truncated rule of reason analysis of horizontal restraints. Frequently the answers to the initial questions in the *Mass. Board* sequence will show that evaluation of market power is required. But in some cases those answers -- that the challenged restraint is likely to restrict competition, and that it lacks a plausible efficiency rationale -- will indicate that a restraint can be fairly condemned without a potentially elaborate and expensive inquiry into market power.

## V.

It is only fair to note that *Mass. Board* is not without its faults and its critics. But if the majority considers *Mass. Board* beyond repair, why has it not overruled the case? If the majority has identified specific weaknesses in *Mass. Board* analysis that might be remedied, why not apply *Mass. Board* in this and other appropriate cases so that the process of case-by-case adaptation and improvement can occur?

As I stated at the outset, the problem with the majority's decision today is not the result. It is the reasoning that tends to determine the lasting significance of an opinion. The majority's reasoning, which amounts to a return to the conclusory labeling that the Commission sought to supplant in *Mass. Board*, is likely to cause confusion in future cases. How will the majority's analysis in *CDA* apply in the next price-related advertising case? Will the Commission summarily condemn any restraint hampering price-related advertising, or only those restraints that effectively *prohibit* price-related advertising? Without some type of rule of reason inquiry, how will we know whether restrictions on price advertising "effectively prohibit" price advertising in a given case? Will the Commission use today's newly-minted

*per se* rule alone or in combination with the backup rule of reason analysis it employs in the present case? Or, since the majority has not seen fit to overrule or modify *Mass. Board* in any way, can we expect to see the Commission apply *Mass. Board* analysis in the future, notwithstanding today's opinion? Unfortunately, all of these are now open questions.

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

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In the Matter of )  
CALIFORNIA DENTAL ) Docket No. D-9259  
ASSOCIATION, )  
a corporation. )

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INITIAL DECISION

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By: Lewis F. Parker, Administrative Law Judge

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## I. INTRODUCTION

The Commission issued its complaint in this matter on July 9, 1993, charging California Dental Association ("CDA") with violations of Section 5 of the Federal Trade Commission ("FTC") Act, as amended, 15 U.S.C. § 45.

The complaint identifies CDA as a California corporation which is a professional association organized in substantial part to represent the interests of its dentist members who are required, if they want to belong to CDA, to join one of its 32 component dental societies.

The complaint charges that CDA has violated Section 5 of the FTC Act by restraining competition among dentists in California by acting as a combination of its members, or by conspiring with at least some of its members and its component societies to restrict unreasonably the dissemination of information to consumers by coercing its members to refrain from particular forms of advertising without regard to whether they are truthful and nondeceptive.

Accordingly to the complaint, these acts and practices have harmed consumers by preventing dentists from truthfully and nondeceptively informing the public of the price, quality, and availability of their services.

CDA's answer denied Commission jurisdiction over its activities because it is not a corporation within the generally accepted meaning of Sections 4 and 5 of the FTC Act, 15 U.S.C. §§ 44 and 45, because its activities do not restrain or affect interstate commerce directly or substantially, and because its activities are the result of its desire to fulfill its public service obligations.

After extensive pretrial discovery, trial was held in San Francisco, California, from February 7, 1995 to February 21, 1995. The parties filed their proposed findings of fact and conclusions of law on April 6, 1995. The record was closed on April 20, 1995.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and conclusions of law and answers thereto filed by the parties. I have adopted several proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

## II. FINDINGS OF FACT

### A. Description of CDA

#### 1. Members

1. CDA is a professional association which is organized as a California non-profit corporation (Cplt at ¶ 1; Ans. at ¶ 1; Tr. 1139),<sup>1</sup> has no shares of stock or certificates of interest (Tr. 1769, 1141), and qualifies as a tax-exempt organization under Section 501(c)(6) of the IRS Code (Tr. 1770-71). CDA's principal place of business is located at 1201 K. Street Mall, Sacramento, California (Ans. at ¶ 1). It has approximately 200 employees (Tr. 1138).

2. CDA has more than 19,000 dentist members, of which 13,500-13,700 are in active practice, who provide dental services for a fee (Ans. at ¶ 2) (Tr. 1166; CX-1550, CX-1656). The members represent about 75% of the

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<sup>1</sup> Abbreviations used in this decision are:

Tr.:	Transcript of the trial
CX:	Commission exhibit
RX:	CDA's exhibit
Cplt:	Complaint
Ans.:	Answer
CB:	Complaint counsel's trial brief
RB:	CDA's trial brief
CPF:	Complaint counsel's proposed findings
RPF:	CDA's proposed findings
F.	Finding

practicing dentists in California (Tr. 1166; CX-1505, CX-1508-B, CX-1510-A, CX-1587-Z-107-08).

3. CDA is a "constituent" society of the American Dental Association ("ADA") (Ans. at ¶ 3; CX-1450-E) and its policies may not conflict with the ADA's Constitution and Bylaws (CX-1450-J). Its Code of Ethics conforms with the Principles of Ethics and Code of Professional Conduct of the ADA (CX-1450-J). To be eligible for membership in ADA, a dentist practicing in California must be a member of CDA (Ans. at ¶ 3; Tr. 1139).

4. CDA has 32 "component" societies (Ans. at ¶ 3; CX-1450-I), which are local or regional societies, located within California, which it charters (CX-1450-E, I). The bylaws of the CDA component societies may not conflict with CDA's Bylaws or the Constitution and Bylaws of the ADA (CX-1450-I). CDA requires dentists to be members of the component within whose jurisdiction they practice in order to be eligible for membership in CDA (Ans. at ¶ 3; Tr. 1139; CX-1450-I).

5. Members of CDA are bound by the codes of ethics of ADA, CDA, and the members' respective component societies (CX-1450-Y).

6. CDA collects dues from its members for itself, its component societies, and ADA, and transmits those dues to its component societies and ADA (CX-1450-H, CX-1649-Y, CX-1650-Z-61, CX-1651-A-26-27). CDA dues are \$525 (CX-1649-X), ADA dues are \$330, and components charge from \$135 to several hundred dollars annually; the average annual "tripartite" dues paid by a member to all three associations are about \$1,100 (Tr. 1159). CDA also collects voluntary contributions for the California Dental Political Action Committee ("CalDPAC") from CDA members (CX-1649-X, CX-1650-Z-61).

7. For fiscal year 1993-1994, CDA projected annual revenues of \$19,889,461 (CX-1484-P). Membership dues

represent the largest single source of CDA's revenues (Tr. 1762, Tr. 1142; CX-1484-P). Other major sources of revenues are: CDA scientific sessions; subscriptions to, and advertising in, CDA's official publications; interest income; sales of printed materials; and rent generated by CDA's headquarters building (CX-1484-P).

## 2. House of Delegates

8. CDA's House of Delegates is its supreme authoritative body (CX-1450-E) and is composed of 202 to 205 CDA members, 200 of whom are elected by CDA's component societies (Tr. 1139; Ans. at ¶ 3; CX-1450-J).

9. The House of Delegates has the power to determine CDA's policies, to amend its articles of incorporation, to adopt and amend its Code of Ethics, to determine and assess dues, to adopt an annual budget, to grant or revoke the charters of its component societies, and to elect its officers, members of its council, and delegates to the ADA House of Delegates (CX-1450-K, Q, Z-4, Z-5, CX-1472-A).

## 3. Board of Trustees

10. CDA's administrative and managing body, the Board of Trustees, is vested with the power to conduct its business according to the policies established by the House of Delegates (CX-1450-O).

11. The Board has 52 members, including 43 trustees elected by CDA's component societies, the seven elected officers of CDA and two "appointed officers" -- the Executive Director and Editor -- who are appointed by the Board (CX-1450-N, O, S-T).

## 4. Standing Committees

12. CDA has six standing committees: Executive, Communications, Direct Reimbursement, Finance, Nominating, and Interdisciplinary Affairs (CX-1450-V-Y).

5. Councils

13. CDA operates ten councils, each of which is responsible for specific functions (Tr. 1148; CX-1450-T-V, CX-1484-Z-23-28). They are the:

14. a. Judicial Council which is charged with interpretation and enforcement of the CDA Code of Ethics (including the advertising restrictions which are the subject of this proceeding), as well as the discipline of CDA members found to have violated its Code (CX-1450-U-V, CX-1484-Z-27-28, CX-1571-G).

15. b. Council on Legislation which formulates positions on legislation and regulation on behalf of CDA and its members (Tr. 1285, 1154, 1208; CX-1483-Z-13, CX-1484-Z-25). The council has a close working relationship with CalDPAC, the "political arm" of CDA (CX-1483-Z-13, CX-1484-Z-26).

16. c. Council on Membership Services which recruits CDA members and is responsible for membership services and benefits (CX-1524-E).

17. d. Council on Education and Professional Relations which oversees a variety of CDA programs, including those which maintain a liaison role with the laboratory industry and monitor national and statewide developments related to denturism and the expanded role of the dental hygienist (Tr. 1205-06; CX-1484-Z-24-25, CX-1571-I, CX-1649-N, Z-30-33).

18. e. Council on Dental Research and Development which monitors trends in infection control and monitors federal and state agency regulations (Tr. 1154; CX-1277-E, CX-1483-Z-11, CX-1484-Z-24).

19. f. Council on Peer Review which provides CDA members with a patient complaint resolution

alternative to costly and protracted litigation (Tr. 1151-52; CX-1448-D, CX-1520-A, CX-1563, CX-1644-B).

20. g. Council on Scientific Sessions which holds two sessions yearly featuring continuing education courses, and displays by hundreds of vendors of new technology, treatment modalities, supplies, and equipment (Tr. 1155; CX-1483-Z-14, CX-1484-Z-27, CX-1502-A, CX-1571-A, D).

21. h. Council on Insurance which develops, monitors, and evaluates insurance programs to serve the needs of CDA members through its subsidiary, The Dentists Company Insurance Services (CX-1482-Z-19, CX-1483-Z-12, CX-1484-Z-5, CX-1571-H).

22. i. Council on Dental Care Programs which monitors government health care programs (Tr. 1149; CX-1483-Z-10, CX-1484-Z-23-24) and the activities of the State Board of Dental Examiners (Tr. 1149). It also has provided: input to third-party payers concerning dental care benefits and claims, insurance claim information to CDA members, and, in conjunction with ADA, a contract analysis service to help members to understand the legal implications of dental contracting (Tr. 1204; CX-1484-Z-23, CX-1571-F; CX-1483-Z-10). It also sponsors an annual dental care and insurance conference (CX-1481-Z-22, CX-1482-Z-17, CX-1483-Z-10).

23. j. Council on Community Health which is CDA's communications center for dental health activities and promotes National Children's Dental Health Month and Senior Smile Week (CX-1484-Z-23, CX-1571-H).

6. For-Profit Subsidiaries

24. CDA has five for-profit subsidiaries--four of which are operating companies--and a holding company for the operating companies (Tr. 1168).

a. The Dentists Insurance Company  
("TDIC")

25. TDIC is a dental malpractice insurance company which underwrites insurance in California only for CDA members (Tr. 1768, 1785, 1168; CX-1587-Z-74). It also underwrites insurance for non-CDA members in Minnesota (Tr. 1785).

26. As of October 1993, TDIC insured approximately 8,800 California dentists, about two-thirds of all actively practicing CDA members (CX-1478-G).

27. CDA created TDIC in 1979 (Tr. 1784; CX-1575-A) as a result of the malpractice crisis in California and the threat of prohibitive insurance premiums for professional liability insurance (CX-1587-Z-62-63, CX-1482-L).

28. Except for one person, all members of TDIC's Board of Directors are, and always have been, members or officials of CDA. CDA's Executive Director is the Vice-Chairman of the TDIC Board of Directors (CX-1587-Z-101-02). TDIC's offices are located in the CDA headquarters building (CX-1448-B, C, CX-1587-Z-58-59, Z-65).

29. TDIC has made dividend payments of \$120,000 and \$320,000 to CDA during the last two years (Tr. 1769; CX-1484-Z-30). Additionally, TDIC pays CDA's Government Relations Office ("GRO") \$30,000 a year (Tr. 1785) for GRO's legislative and lobbying activities relating to professional liability insurance issues (CX-1650-Z-13-14).

b. The Dentists Company  
("TDC")

30. CDA created TDC in 1982 to provide and broker a wide range of high quality products to CDA members (TR.

1776; CX-1652-Y, CX-1484-Z-29), and to contribute financially to CDA's activities (CX-1448-C, CX-1472-A). TDC offers professional and personal financial services and other services to CDA members (Tr. 1778-80; CX-1570-A-F).

31. Except for one non-dentist/non-employee member, all members of the TDC Board of Directors are, and always have been, members or officials of CDA (CX-1587-Z-101-02). CDA's Executive Director is the Vice-Chairman of the TDC Board of Directors (CX-1587-Z-102). CDA's Chief Financial Officer ("CFO") is the CFO and sole Vice-President of TDC (Tr. 1775-76). TDC's offices are located in the CDA headquarters building (Tr. 1778; CX-1448-B, C).

32. TDC made a dividend payment of \$100,000 to CDA in September 1992 (TR. 1769; CX-1484-Z-29), and TDC's activities have added over \$5 million to CDA's assets (CX-1483-Z-15), materially improving CDA's financial position (CX-1483-Z-15, CX-1637-D).

c. The Dentists Company  
Insurance Services ("TDCIS")

33. CDA created TDCIS in 1983 (Tr. 1781). TDCIS is the broker/administrator for a number of CDA-sponsored business and personal insurance plans offered to CDA members (Tr. 1768, 1783-84; CX-1558-A-F, CX-1575-G-H). These insurance plans are offered only to CDA members (Tr. 1782; CX-1652-Z-9) and, in some cases, to the spouses and staff of CDA members and to employees of CDA's local component societies (CX-1558-A, F, CX-1575-G). TDCIS's insurance plans have more than 13,000 policyholders and more than 30,000 individual policies in place (Tr. 1782-83; CX-1484-W, Z-25, Z-29). TDCIS bills and collects more than \$55 million a year (Tr. 1783; CX-1484-W, Z-29).

34. TDCIS has a "close working relationship" with CDA's Council on Insurance (CX-1484-Z-29), which is "the

entity that determines which insurance programs will be sponsored by [CDA], and subsequently brokered by [TDCIS]" (CX-1649-V). Members of the TDCIS staff attend the council's meetings and "maintain close levels of communication" (CX-1484-Z-29).

35. Except for one non-dentist/non-employee member, all members of the TDCIS Board of Directors are, and always have been, members or officials of CDA (Tr. 1781; CX-1587-Z-101-02). CDA's Executive Director is the Vice-Chairman of the TDCIS Board of Directors (CX-1587-Z-102). CDA's CFO is the CFO and sole Vice-President of TDCIS (Tr. 1780; CX-1652-V). TDCIS's offices are located in CDA's headquarters building (Tr. 1782; CX-1448-B, C).

36. "Each year, TDCIS has presented [CDA] with a dividend or other support based on TDCIS's income" (CX-1475-D). TDCIS pays CDA's GRO \$30,000 a year (Tr. 1781-82) for legislative and lobbying activities relating to insurance issues (CX-1650-Z-13-14).

d. The Dentists Company Management Services ("TDCMS")

37. CDA created TDCMS in 1987 (CX-1346-E). Its function is to manage the operation of the CDA headquarters building (Tr. 1768). Prior to 1994, TDCMS also provided many of the administrative services currently provided to CDA and its subsidiaries by CDA Holding Company, Inc. (CX-1346-E, CX-1466-A, G). CDA's Executive Director is the Chairman of the Board of TDCMS (CX-1652-Z-1-2). CDA's CFO is the CFO and Vice-President of TDCMS (Tr. 1784).

e. CDA Holding Company, Inc. ("CDAHC")

38. CDAHC was created to assume ownership of CDA's for-profit subsidiaries as part of its corporate

reorganization in 1993 (Tr. 1764, 1773; CX-1466-A, G, CX-1472-A, N).

39. This reorganization was done primarily to further define and protect CDA's status as a § 501(c)(6) tax-exempt organization (Tr. 1774, 1188; CX-1472-A, N, CX-1587-Z-60, CX-1652-Z-5).

40. CDA is the sole owner of CDAHC which, in turn, holds the stock of CDA's other for-profit subsidiaries (Tr. 1768, 1773, 1187).

41. CDA elects the members of CDAHC's Board of Directors (Tr. 1188-89, 1778; CX-1450-K, M, Z-4-5), and CDA's Board of Trustees may remove directors of CDAHC (CX-1450-O, CX-1587-Z-67). All but one member of CDAHC's Board of Directors are members or officials of CDA (Tr. 1189, 1792; CX-1450-Z-5, CX-1587-Z-66-67). CDA's current President is a member of CDAHC's Board of Directors (Tr. 1413; CX-1651-Z-20); CDA's Executive Director is Chief Executive Officer of CDAHC (Tr. 1136; CX-1652-R); and CDA's CFO is the CFO and sole Vice-President of CDAHC (Tr. 1787-88; CX-1652-Q). CDA employees assist CDA's CFO with his duties relating to CDA's for-profit subsidiaries (CX-1652-K-L, R, X). CDAHC pays a portion of the salaries of CDA's CFO and the staff that assists him in providing services for CDAHC (Tr. 1774-75; CX-1652-S).

42. CDA's House of Delegates recommends candidates for the boards of directors of the operating companies to CDAHC, which then selects the directors of the operating companies (CX-1450-K, O, Z-5, CX-1587-Z-67). CDAHC may remove and replace any of a subsidiary operating company's board members (CX-1450-Z-5).

43. CDA's Bylaws provide for payments by CDAHC to CDA of dividends or other payments generated by CDA's for-profit subsidiaries (CX-1450-Z-5, CX-1466-A, CX-1484-W, CX-1587-Z-103). By design, CDAHC

currently does not generate profits; instead, it bills CDA and its subsidiaries for administrative services it provides, at cost (Tr. 1775).

#### 7. Nonprofit Subsidiaries

44. CDA has two nonprofit subsidiaries organized under § 501(c)(3) of the IRS Code: The CDA Relief Fund grants financial aid to dentists, their dependents, and survivors. The CDA Charitable Fund maintains a separate financial account for a disaster loan program (Tr. 1167-68, 1172; CX-1450-Z-4).

#### 8. Rotunda Partners

45. CDA is the general partner of Rotunda Partners, which owns most of the CDA headquarters building in Sacramento (Tr. 1790). CDA owns 60% of Rotunda; TDIC owns the remaining 40% (Tr. 1169; CX-1652-Z-3).

#### 9. California Dental Political Action Committee ("CalDPAC")

46. CalDPAC is an unincorporated association of dentists that was formed to make financial contributions to political candidates and parties sympathetic to issues of concern to dentistry (CX-1483-J, CX-1587-Z-129, CX-1650-Z-67-69).

47. CalDPAC is not legally a subsidiary or division of CDA, but it is considered the "political arm" of CDA and is closely affiliated with it (CX-1483-Z-13, CX-1484-Z-26, CX-1650-Z-3-4, Z-16, Z-50-55, Z-62-63, Z-67-68, CX-1587-Z-129-31; Tr. 1202).

48. Approximately 40 to 45% of CDA members contribute to CalDPAC (Tr. 1194; CX-1448, CX-1464-G, CX-1650-Z-65).

49. Over the past several years, the level of CalDPAC's political contributions has remained stable, at approximately \$300,000 to \$350,000 per two-year state legislative cycle (Tr. 1194; CX-1448-D, CX-1644-B, CX-1650-Z-67-68).

#### B. Interstate Commerce

##### 1. Interstate Reimbursement For Dental Services

50. Fifty percent of the funding for California's Medicaid programs for dental services ("Denti-Cal") comes from the federal government. In calendar year 1994, the Denti-Cal program paid out approximately \$500 million to billing providers, most of whom were members of CDA (Tr. 728, 1286; CX-1658).

##### 2. Interstate Sale and Lease of Equipment and Supplies

51. CDA members purchase, lease, and use substantial amounts of dental equipment and dental-related products from manufacturers and suppliers located outside of California (Tr. 1405, 295-96, 750-55, 1000-02, 463-64, 328-29, 673-75; CX-1651-Q).

52. The CDA Journal and CDA Update carry many advertisements for products and services by out-of-state manufacturers and suppliers (CX-1451-E, G, CX-1452-B, CX-1455-E, I, CX-1456-J, L, CX-1457-L, CX-1458-E, CX-1461-H, CX-1466-D, CX-1470-J, CX-1474-E, CX-1476-K, CX-1476-F, G, N, CX-1479-K, N, CX-1480-H, CX-1482-M, Z-8, Z-10, Z-13, Z-46, Z-48, Z-54, CX-1483-Z-19, CX-1484-Z-12, Z-32, Z-53), and a substantial number of readers of the publications purchase such items (CX-1453-P).

53. CDA's scientific sessions feature exhibitions by many out-of-state vendors of dental-related products and services which CDA members may purchase (Tr. 782-83, 1772; CX-1452-A, CX-1571-A).

3. Other Activities of CDA and Its Members  
Involving Interstate Commerce

54. In some cases, out-of-state suppliers of services to CDA members have been unable to use certain advertising practices because of CDA's ethical advertising restrictions (Tr. 803-05, 603-10; CX-1209). CDA has placed advertisements, which must comply with its Code of Ethics, in publications with national distribution, including the Wall Street Journal, Fortune, and Business Week (CX-1455-M, CX-1450-V, X, CX-1651-Z-43).

55. "[M]any of CDA's members have been and are now in competition among themselves and other dentists, both within and outside the State of California" (Ans. at ¶ 4), and some CDA members reside outside of the State (CX-1656).

56. CDA members treat patients who reside outside of California (Tr. 1405, 771-72, 293, 1000, 462-63, 326-27, 672-73; CX-1608-M-N, CX-1611-I, Z-87, CX-1651-N-O), and approximately 4.5% of its members reside outside of California (CX-1656).

57. CDA and its components use the U.S. Postal Service to communicate with their members or applicants for membership whose advertising they challenge (Tr. 1021, 354). They also communicate, when necessary, with the ADA, which is located in Chicago, Illinois (Tr. 374-75, 1223; CX-1587-Z-55, CX-1450-Z-1-2, CX-1469-Z-57-58, CX-1651-Z-71). CDA also uses the Postal Service to deliver its Journal and Update to out-of-state concerns (Tr. 1772-73; CX-1481-Z-26-31, CX-1482-Z-49-53, CX-1484-Z-47-51, CX-1448-D, CX-1571-D, CX-1625-I-N).

58. CDA officials and members attend out-of-state conferences (Tr. 1185; CX-1450-K, Z-3, Z-40-41, CX-1587-Z-51-54, CX-1651-Z-27-29).

59. CDA, through TDC and TDCIS, offers services to CDA members through out-of-state firms, including

providers of life insurance (CX-1480-K), medical insurance (CX-1558-B), income insurance (CX-1558-C), disability insurance (CX-1558-D), accidental death and dismemberment insurance (CX-1480-D, F, CX-1558-E-F), office property insurance (CX-1480-D, F, CX-1558-E-F), VISA cards (CX-1484-Z-29), home equity loans (CX-1484-Z-29), home mortgages (CX-1484-G), and long distance phone service (CX-1484-Z-29).

60. TDIC operates in Minnesota and has applied for licenses to do so in other states (CX-1468-E, CX-1480-A, CX-1484-Z-30).

61. CDA secured a loan for \$39 million from an out-of-state insurance company to purchase its current headquarters building in Sacramento, California (Tr. 1790-91; CX-1470-F, CX-1652-Z-34-35).

62. CDA collects annual ADA membership dues from California members and transmits them to ADA headquarters in Illinois (Tr. 1190, 1415).

C. CDA Activities Conferring Pecuniary Benefits on Its Members

I. CDA's Purpose

63. CDA has often stated that one of its primary purposes is to "represent dentists in all matters that affect the profession" (CX-1546-A), and it provides the kind of benefits which individual dentists could not realize by acting individually (CX-1488, CX-1502-A, CX-1508-B, CX-1509-B, CX-1510-A, CX-1533, CX-1544).

2. Source of Revenues

64. CDA's budgeted revenue for its 1993-94 fiscal year was \$19,889,461 (CX-1484-P). Its largest source of funding was membership dues and revenue derived from membership-related activities such as the sale of professional

liability insurance to members (Tr. 1762, 1142, 1812). CDA's current dues for active members are \$525. The average cost of dues for members of ADA, CDA and a CDA component ("tripartite dues") is approximately \$1100 (Tr. 1159).

### 3. Tax Status

65. CDA is exempt from federal income taxation pursuant to § 501(c) (6) of the Internal Revenue Code, 26 U.S.C. § 501(c) (6) (Tr. 1770, 1141, 1853; CX-1587-Z-55), which exempts "business leagues, chambers of commerce, real estate boards and boards of trade" consisting of members that share common business interests (26 C.F.R. § 1501(c) (6)-1; Tr. 1771, 1853). CDA is not exempt from federal income taxation under § 501(c) (3) of the Code, 26 U.S.C. § 501(c) (3), which governs organizations formed and operated solely for religious, charitable, scientific, or educational purposes (Tr. 1853).

66. In calculating their federal and state income taxes, members of CDA may not deduct the cost of membership dues as a charitable contribution (Tr. 1416, 1858). Instead, members of CDA may deduct most of their dues as ordinary and necessary business expenditures directly connected with or pertaining to their trade or business (26 C.F.R. §§ 1.162-1(a), 1.162-6; Tr. 1415). However, CDA members may not deduct that portion of association dues allocated by CDA to political lobbying activities (Tr. 1416; CX-1478-C; CX-1479-N, CX-1587-Z-111-12), which, in 1993, was estimated to be approximately \$26 per member (CX-1478-C, CX-1479-N).

### 4. General Benefits of CDA Membership

67. CDA has often touted the benefits of membership, including such statements as:

[CDA] is dedicated to offering the most comprehensive array of benefits and programs to assist practitioners in

practice management. OSHA compliance and infection control to name a few (CX-1575-B).

[CDA] offers far more services to its members than any other state [dental] association (CX-1544).

In fact, CDA's accounting expert identified upwards of 50 CDA membership benefits (Tr. 1843), whose value exceeds the average membership dues, resulting in a net benefit to its members (Tr. 1849, 1851-53, 1859).

68. CDA has stated that a selection of its programs and services has a potential value to members of between \$22,739 and \$65,127 (CX-1520-A-B, CX-1571-A, L). In 1993, its president stated: "CDA is extremely valuable to the members . . . CDA members are getting their money's worth and then some" (CX-1473-O).

69. CDA's "Direct Member Services" have accounted for as much as 65% of its total financial expenditures in a given year, with "Association Administration & Indirect Member Services" accounting for an additional 20% of expenditures (Tr. 1192-93; CX-1448-C, CX-1587-Z-120-21). The last time CDA conducted this analysis, "Services to the Public" accounted for seven percent of CDA's total expenditures (Tr. 1193; CX-1448-C).

### 5. Specific Benefits of CDA Membership

#### a. Lobbying and Efforts to Influence Government Action

##### (1) Council on Legislation

70. CDA's Council on Legislation monitors legislative and regulatory actions which have potential implications for dentistry and adopts policy positions on behalf of CDA (CX-1484-Z-25; Tr. 1285). CDA's GRO takes the policies established by the Council on Legislation and argues for them before the appropriate governmental body (Tr. 1285;

CX-1562, CX-1571-E). The Council on Legislation gives GRO explicit instructions on about 100 bills per session of the California Legislature (CX-1650-Z-33).

71. CDA budgeted \$121,309 for "government relations" activities for 1993-94, not including the salaries of GRO's seven employees (CX-1650-Z-4, Z-37, Z-43, CX-1652-Z-22-33).

72. In 1992, CDA's President told its members:

Government is like an octopus in our lives. Its tentacles are everywhere: in our dental practices and in our homes. If CDA's not there, who is watching out for the interests of dentists? Nobody (CX-1484-X).

73. CDA has also claimed that it "provide[s] a strong, unified voice as we represent the interests of our members before regulatory agencies" (CX-1502-A).

74. Other remarks of CDA officials have emphasized the pecuniary benefits of its lobbying activities:

CDA's [l]egislative wins "mean money" to members (CX-1463-A).

CDA represents the interests of its members and has been successful in defeating several bills which would have cost practitioners several thousands of dollars a year (CX-1532-A).

CDA's President stated, in 1993:

[w]hat we save the dentist in potential costs of what the government would like to do, saves the CDA member at least the equivalent of their annual dues every year (CX-1473-N).

75. Specific examples of CDA actions affecting government decisions include:

(2) Infectious/Hazardous Waste Regulation

76. CDA successfully opposed passage of provisions of three bills relating to infectious waste regulation, hazardous waste generator permits, and informed consent before placement of silver amalgam (CX-1458-F, CX-1463-A, I, CX-1483-K, CX-1510-A, CX-1520-A, CX-1539) at a CDA-estimated savings of over \$2,000 per year of practice and \$66,000 over 30 years (CX-1510-A, CX-1520-A).

(3) Malpractice Reform

77. CDA supported passage of California's Medical Injury Compensation Reform Act of 1975 ("MICRA") (CX-1555-I, CX-1587-Z-140-41) and continues to defend it (Tr. 1306). The passage of that bill, according to CDA's immediate past President, was of great benefit:

Professional Liability Premiums in California last year were one billion dollars. Without MICRA, it is estimated conservatively that the figure would easily exceed 2.5 billion dollars. That increase alone would pay all your CDA/ADA/local dues each year forever. What MICRA has done is assure that payments go to victims, that the costs of litigation are reduced, that windfalls are eliminated, and most importantly, that healthcare providers such as you and I can continue to treat patients without the fear of unfounded lawsuits (CX-1484-R, T).

(4) Workers' Compensation

78. CDA successfully supported a package of workers' compensation reform bills, which are projected to save employers, including dentists, a total of \$1.5 billion (CX-1477-F).

(5) Taxation of Dentists and Dental Practices

79. CDA, along with others, successfully opposed Proposition 167 which would have increased taxes for high bracket taxpayers (CX-1466-D, F, CX-1484-K).

(6) Mandatory Employer Healthcare Coverage

80. In 1992, CDA successfully opposed Proposition 166, which would have required employers, including dentists, to provide basic health care insurance coverage for part-time employees and their dependents (CX-1466-D, CX-1468-E, CX-1484-K).

(7) Denti-Cal

81. CDA has fought to preserve funding of the dental Medicaid program operated by the State of California ("Denti-Cal") (Tr. 726), and its efforts were "instrumental in retaining the Denti-Cal program and enhancing reimbursement rates" (CX-1571-A). More than 5,000 CDA members provide dental services to Denti-Cal patients (CX-1658).

(8) Unsupervised Practice By Dental Hygienists

82. CDA opposes, and has opposed, legislation that would permit dental hygienists to practice without supervision by a dentist (CX-1462-D, CX-1476-C, CX-1481-P, CX-1482-U, CX-1483-Z-13, Z-37, CX-1484-R, CX-1485-B, CX-1571-A, CX-1587-Z-138), an issue which affects dentists' "pocketbooks" (CX-1473, CX-1477-F, CX-1484-X).

(9) CalDPAC

83. CalDPAC's political activities benefit CDA members economically (CX-1277-C, CX-1375-B, CX-1462-E, CX-1472-F, CX-1483-J, CX-1520-A, CX-1571-A). In 1993, CDA's President described the GRO and CalDPAC as "of all we do, the things with the most importance for our future" (CX-1474-I, CX-1484-N).

(10) Litigation

84. CDA has been involved in legal challenges to or arguments in support of government and regulatory policies, including a challenge to HHS regulations implementing the Health Care Quality Improve Act (CX-1477-A, CX-1482-M, S-T). CDA estimated the value of victory in that case as "[i]ncalculable related to reputation" (CX-1571-L). See also CX-1453-C, CX-1480-D, H, CX-1650-L-M, CX-1461-F, CX-1472-H, CX-1587-Z-150, CX-1482-U, CX-1483-Z-38, Z-41.

(11) Other Government Action

85. CDA has supported or opposed many other legislative or regulatory actions which would affect its members' pocket books (CX-1474-E, K, CX-1484-Z-25, CX-1485-A, B, C, CX-1483-Z-13, Z-40, CX-1467-K, CX-1476-A, CX-1464-K, CX-1481-V, CX-1452-A, F, G, CX-1637-F, CX-1463-K).

b. Marketing and Public Relations

86. CDA budgeted over \$2.1 million for its marketing program for 1993-94 (CX-1484-P, CX-1652-Z-20). A major goal of this program, which is assisted by an advertising agency and a public relations firm (Tr. 1164; CX-1446-O, CX-1469-E, CX-1484-Z-1-2, CX-1587-Z-152-54) is to enhance the image of CDA and its member dentists and to distinguish the latter from non-members in terms of their

commitment to quality care (Tr. 1412; CX-1481-X, CX-1483-Z-37, CX-1484-F, CX-1563, CX-1587-Z-155-56, CX-1648-A-B, CX-1651-Z-42, CX-1654-D, CX-1455-M).

87. Other marketing schemes used by CDA include: a campaign encouraging dental patients to insist that their dental plans give them the right to choose their own dentists (CX-1481-N, S, CX-1508-A, CX-1552-G); a campaign to encourage the Latino population to use CDA dentists (CX-1469-E, CX-1473-M, CX-1475-K, CX-1476-A, CX-1484-Z-2); and, the use of CDA logos on stationery and other business materials (CX-1497, CX-1555-F).

88. In 1985, CDA estimated that increased patient visits to member dentists because of the marketing program resulted in "nearly \$6,000 in additional revenues [per member dentist], or a 20-to-1 return on investment" (CX-1231-B).

c. Direct Reimbursement

89. Since at least 1989, CDA has promoted "direct reimbursement," an alternative to closed panel dental insurance plans (CX-1460-E, CX-1456-F, CX-1465-F, CX-1473-G, CX-1508-A) under which employers self-fund the cost of dental benefits for their employees, without insurance company involvement (CX-1275-C, CX-1473-G).

90. Direct reimbursement benefits CDA members (CX-1534, CX-1535) by "eliminat[ing] many of the restrictions imposed by the insurance carriers" (CX-1457-J).

91. CDA has established a Direct Reimbursement Committee which administers this program, for which CDA budgeted \$94,985 (excluding staff salaries) in fiscal year 1993-94 (CX-1450-X-Y, CX-1484-P, CX-1652-Z-19, Z-22-23).

d. Practice Management and Related Programs and Services

92. CDA's twice-annual scientific sessions offer seminars on topics relating to the non-clinical aspects of dental practice, including practice management, risk management, dental administration, and investment and estate planning (CX-1448-D, CX-1481-Z-36-37, CX-1482-Z-29-30, CX-1483-Z-57, Z-60-61, CX-1512-B, CX-1522-F).

93. CDA's for-profit malpractice insurance subsidiary, TDIC, has offered practice improvement seminars dealing with patient relations and dental practice risk reduction (CX-1482-Z-37, CX-1484-Z-30, CX-1511-C, CX-1512-A, CX-1587-Z-82). TDIC also provides a quarterly newsletter, a home-study course, and a lending library of risk management resources (CX-1482-Z-37, CX-1563-E, CX-1571-J).

94. In response to "membership concerns about the impact of new OSHA and [EPA] regulations on dental practice" (CX-1481), CDA developed an OSHA compliance manual (\$25 for members, \$255 for non-members) (CX-1481-N, V, CX-1483-Z-11, Z-40, CX-1501, CX-1503, CX-1528, CX-1531, CX-1537, CX-1562-G, CX-1571-G, CX-1573-D, CX-1575-D; Tr. 1174).

95. CDA provides its members with "delinquent license notification" (CX-1458-A), a service which allows members whose licenses have expired to correct their status before the licenses are canceled (CX-1526-C).

96. Another "important membership benefit" (CX-1494, CX-1566-B) is CDA's provision to members of OSHA and labor law posters required by law to be displayed in dental offices (Tr. 1174; CX-1462-L, CX-1483-K, CX-1492-A-B, CX-1499, CX-1501, CX-1510-A, CX-1573-D). CDA also provides members with information

about compliance with the Americans With Disabilities Act (CX-1503, CX-1510-A).

97. CDA provides other practice-related programs to members: A professional placement program which, CDA has stated, can save members several thousand dollars (CX-1520-B, CX-1448-E, CX-1453-O, CX-1493, CX-1513-B, CX-1515-B, CX-1520-B, CX-1524-A, CX-1543) (free to members: \$100 per six month period for non-members); a guidance or "mentor" program under which experienced dentists offer business advice to new CDA members (Tr. 338-39; CX-1453-D, CX-1496-B, CX-1522-B, CX-1519-G); an auxiliary recruitment program which places urgently needed dental hygienists, dental assistants, and dental lab technicians into member dentists' offices (CX-1455-C, CX-1587-Z-162, CX-1459-I, CX-1462-K, CX-1522-F-H, CX-1634-C, L, M); a program offering in-office training of beginning dental assistants (at a 25% discount) (CX-1455-C, CX-1634-G, CX-1517-B); a program which offers CDA members review and analysis of contracts which members may want to make with third-party payers, such as PPO's, capitation plans, or other dental benefits plans (Tr. 1248-49, 1175; CX-1451-A, C, CX-1483-Z-10, CX-1484-Z-23, CX-1501, CX-1503, CX-1562-F, CX-1563, CX-1571-A, F, CX-1575-C, CX-1639-B, CX-1644-B) which CDA estimates can save members hundred of dollars in attorneys' fees (Tr. 1204; CX-1563, CX-1571-A); and an annual retirement and financial planning seminar (\$95 for CDA members; \$245 for non-members) (CX-1487-A-B, CX-1501, CX-1502-A, CX-1525-A, CX-1575-C, CX-1459-H, CX-1486-B).

e. Peer Review

98. CDA's peer review program provides members with an easier, less costly alternative than litigation to resolve patient complaints (Tr. 291-92, 1151, 1397-98; CX-1448-D, CX-1510-A, CX-1520-A, CX-1563, CX-1571-A).

99. CDA estimates that this program's value to members is about \$10,000 per incident as compared with "potentially costly, lengthy litigation" or disciplinary action by the State Board of Dental Examiners (CX-1520-A, CX-1571-A).

100. About 900-1,000 peer review cases are resolved each year (Tr. 1152, CX-1484-Z-23).

f. Scientific Sessions and Continuing Education

101. CDA sponsors two scientific sessions each year which it has described as "a premier member benefit" (CX-1488-A, CX-1520-A, CX-1571-A, CX-1489-A) and "the most visible and tangible membership benefit" (CX-1483-W).

102. CDA budgets over \$1 million for these two sessions (CX-1481-Z-15, CX-1482-Z-47, CX-1483-M) not including staff salaries (CX-1652-Z-22-23), which are attended by thousands of dentists, dental auxiliaries, staff, exhibitors and guests (Tr. 1155; CX-1452-A, CX-1484-Z-27, CX-1488-A, CX-1489-A).

103. The sessions offer courses, seminars, and workshops covering scientific, clinical, practice management, and financial matters (Tr. 1156-57, 1416-19; CX-1448-D, CX-1480-D, CX-1481-Z-36-37, CX-1482-Z-29-30, CX-1483-Z-57, Z-60-61, CX-1522-F, CX-1587-Z-168).

104. Member dentists may attend these sessions free of charge (Tr. 289; CX-1483-Z-55, CX-1488-A, CX-1510-A, CX-1532-A, CX-1544, CX-1562-C, CX-1571-A, D, CX-1587-Z-166). Non-members must pay a registration fee (\$855 in 1993) to attend (Tr. 1156, 289-90, 381; CX-1481-Z-44, CX-1482-Z-35, CX-1483-Z-55, CX-1488-A, CX-1504-A, CX-1587-Z-166-67, CX-1638-A).

105. The scientific sessions also offer dentists a convenient way to earn continuing education credits which are required by the State (Tr. 1157, 1160, 1397, 1195-96; CX-1448-D). This is a free, substantial benefit to members. In contrast, non-members would have to pay from \$1,600 to \$2,000 a year to earn equivalent credits (Tr. 290-91, 1397, CX-1448-D, CX-1462-I, CX-1562-C, CX-1571-A-D, CX-1575-D, CX-1587-Z-166, CX-1644-B).

106. Income from the scientific sessions helps to defray the costs of operating CDA, and may offset dues increases (CX-1484-N, CX-1482-L).

g. Publications

107. The official publications of CDA, the CDA Journal and CDA Update, provide CDA members with "the latest information regarding dental research, techniques and materials, as well as legal and legislative news" (CX-1571-L). The subscription rate for the Journal for members is \$12; for non-members it is \$60 (CX-1484). The rate for the Update is \$6 as compared to \$24 for non-members (CX-1480-B).

108. CDA has stated that, "[b]y providing its readers with the latest in scientific and practice management information, the Journal keeps CDA members on the leading edge of technology and dental care" (CX-1575-C).

h. Benefits Provided Through For-Profit Subsidiaries

(1) TDIC

109. TDIC's purpose is to provide "stable, reasonable professional liability insurance for CDA member dentists . . ." (CX-1472-A). In California, insurance is offered only to CDA members (Tr. 1785; CX-1587-Z-74). CDA has estimated the annual "value to member" of this coverage at over \$1,000 (CX-1520-B). And, according to CDA's

Executive Director: "If TDIC were not in operation, it is an absolute certainty that the kinds of liability insurance costs would have continued to rise and never stabilized the way they have" (CX-1587-Z-84).

110. CDA also provides, through TDIC, state-required liability insurance to candidates for the California, Nevada, and Western Regional dental licensure examinations (CX-1490, CX-1491-A-B, CX-1501, CX-1522-B, CX-1525-B, CX-1526-C, CX-1544, CX-1649-Z-21-22). This insurance is free of charge to CDA members; it is not available to non-members (CX-1501, CX-1544, CX-1649-Z-1).

111. TDIC provides professional liability insurance for over two-thirds of actively practicing CDA members (CX-1478-G, CX-1480-A, G, CX-1484-Z-30).

112. TDIC has paid dividends and made other payments to CDA which contribute to a stable dues structure and keep dues lower than they might have been (Tr. 1413-14, 1189-90, 1769, 1785).

(2) TDCIS

113. TDCIS' stated purpose is "to serve as broker and administrator for various insurance programs provided for CDA members" and "to provide the finest insurance programs at competitive rates for eligible CDA members, their families and employees" (CX-1472-A, CX-1475-D).

114. TDCIS insurance plans are available only to CDA members (Tr. 1782, 1792; CX-1509-A-B, CX-1532-A, E) and, in some cases, the members' spouses and staff, and to CDA component dental society employees (CX-1558-A, F, CX-1575-G).

115. TDCIS has more than 13,000 policyholders, more than 30,000 individual policies in place, and bills and collects more than \$55 million a year (Tr. 1782-83;

CX-1484-W, Z-25, Z-29). Moreover, "each policy purchased by a CDA member contributes to the net income of TDCIS, which ultimately provides dividends to CDA" (CX-1484-Z-29).

(3) TDC

116. TDC's purpose is to provide and broker a wide range of high-quality services and products to CDA members at competitive fees with net profits to ensure its growth and to support CDA's activities (CX-1448-C, CX-1472-A, CX-1484-Z-29, CX-1546-B, CX-1562-D, CX-1571-J, CX-1637-D). These services are available only to CDA members (Tr. 1792; CX-1509-A-B).

117. The services and products provided by TDC include: a revolving line of credit of up to \$5,000 to patients of CDA members (CX-1455-K, CX-1476-F, CX-1484-Z-29, CX-1570-D, CX-1571-J, CX-1587-Z-95-96). This "valuable service" was used by 1, 042 dental offices as of March 1993 (CX-1484-Z-29); dental equipment financing (Tr. 1780; CX-1479, CX-1570-C, CX-1571-J); special discounts on U.S. Sprint long distance telephone services (CX-1460-G, CX-1484-Z-29, CX-1570-F, CX-1571-J); "reduced cost printing services" (CX-1521, CX-1563); a home mortgage program which shortly after being offered, received over \$30.8 million in applications (Tr. 1778-79; CX-1476-G, CX-1480-G, CX-1570-E, CX-1571-J, CX-1651-Z-40); a VISA gold card issued by Marine Midland Bank (Tr. 1779; CX-1480-K, CX-1484-Z-29, CX-1570-E, CX-1571-J, CX-1572-A-B, CX-1651-Z-40); and, automobile leasing services (Tr. 1780; CX-1480-K, CX-1484-Z-29, CX-1570-D, CX-1571-J). These services are used by a substantial number of CDA members (CX-1479-P, CX-1484-Z-29).

118. TDC has paid dividends to CDA which help maintain a stable dues structure and keep membership fees lower than they otherwise might have been (Tr. 1769, 1413-14, 1189-90). TDC's substantial payments to CDA (\$5

million) have materially improved its financial position (CX-1483-Z-15, CX-1484-Z-29, CX-1546-B, CX-1637-D).

i. ADA and Local Component Membership

119. CDA membership carries with it membership in the ADA and local component societies which offer additional worthwhile programs for members.

120. There are many benefits to membership in ADA. These include: a home mortgage program; professional liability insurance coverage; advice about dental benefits programs and alternative delivery systems; a contract analysis service; credit cards for personal and business use; credit union membership; group life and health insurance; an equipment leasing program; long distance telephone discounts; a practice financing program; the "Health Cap Card," providing credit for dental patients; an antitrust law brochure; ADA's Annual Session; national dental health promotions; audiovisual education and training materials; dental product evaluation programs; legislative representation; the Journal of the American Dental Association and the ADA News newsletter; toll-free access to the world's largest dental library; a health screening program for members; public relations activities that enhance the image of dentists; and, practice management information (CX-1574-A-B, CX-1639-A-M, CX-1649-Z-38-53, CX-1563). ADA membership benefits also include a peer review system (Tr. 1228), and services designed to help dentists run, and become efficient in the administration of, their dental practices (Tr. 1227-28, 1246). ADA also offers publications like "Building Successful Associateships," "Successful Valuation of a Dental Practice," and a "Directory of Dental Practice Appraisers and Valuators" (CX-1493, CX-1524-O, CX-1568-C), and advice regarding the Americans With Disabilities Act and its effect on the dental office (CX-1468-F). CDA has touted many of the above-listed programs, services, and activities of ADA as beneficial

to CDA members (CX-1521, CX-1563, CX-1571-A, CX-1575-C, CX-1648-A).

121. Membership in local component societies also carries with it several benefits: referral services, provided at no charge to members (CX-1471-C, CX-1563, CX-1565-B, CX-1571-L), which can save them thousands of dollars a year in fees which would otherwise be paid to commercial referral services (CX-1563, CX-1565-B, CX-1571-L); emergency referral services which can help new dentists increase their patient base and build their practices (CX-1560, CX-1626-B, CX-1653-F); component "study clubs" which assist new CDA members in learning some of the skills of practice management which are not taught in dental schools (Tr. 337-39; CX-1400-L). In addition, component continuing education courses are often offered at no charge to members (CX-1626-A), or at lower rates than are available to non-members (CX-1277-F, CX-1538-B, CX-1563). CDA has touted all of these programs and services as being beneficial to its members (CX-1499, CX-1521, CX-1563, CX-1571-L, CX-1648-A).

122. Finally, tripartite membership enhances a dentist's reputation and undoubtedly attracts customers who believe that membership in a professional organization is an indication of competence (see Tr. 1679, 1407, 1653, 1844, 287, 384; CX-789-B, CX-880-A).

#### D. CDA's Charitable Activities

123. Dr. Dale F. Redig, CDA's executive director, testified about CDA activities which improve the health of the public and promote the art and science of dentistry (Tr. 1136):

CDA has supported legislation promoting fluoridation, clarifying regulations and legislation related to OSHA standards, and has supported steps to increase compensation to California dentists under the Denti-Cal Medicaid program. After a series of court actions,

Denti-Cal's reimbursement level is about 60 to 65% of the usual, customary and reasonable fees (Tr. 1143-45).

CDA supports infection control and the Dental Patient Bill of Rights, which promotes the welfare of dental patients in California (Tr. 1145-47).

CDA seeks adequate dental prepayment systems which encourage the public to use dental care regularly (Tr. 1145).

124. CDA has supported legislation which benefits the public, even though it may be opposed by its members.

125. These programs include encouragement of fluoridation (Tr. 1360), increased training requirements for the use of conscious sedation (Tr. 1294), opposition to proposed laws that patients be tested for AIDS (Tr. 1297), opposition to "informed consent laws" concerning amalgam fillings (Tr. 1299), and, encouragement of legislation to curtail smoking (Tr. 1293).

126. CDA's Council on Scientific Sessions promotes, for the benefit of the public, advances in dentistry by sponsoring scientific presentations (Tr. 1155-56).

127. CDA has disaster and relief funds which help member and non-member dentists who are in desperate financial need because of illness or disaster (Tr. 1167).

128. Dr. Martin Craven, President of CDA and a former member of the AMA, testified that the public service aspects of AMA and CDA are not comparable and described AMA, in contrast, as a mere political organization interested in accumulating wealth whereas CDA's focus is on improving the dental health of the citizens of California (Tr. 1402). In his opinion, the major purpose of CDA's activities is to benefit the public (Tr. 1431).

E. CDA's Advertising Policy

129. As a condition to CDA membership, a California dentist must subscribe to, adhere to, and be bound by its Code of Ethics and Bylaws (CX-1450-E, CX-1258-E).

130. CDA's Code states:

[a] member may be disciplined for unprofessional conduct as it is defined by the Dental Practice Act, and for violation of any law of the State of California relating to the Practice of Dentistry (CDA Code § 5) (RX-64-A).

131. In a press release issued after the complaint in this matter was issued, CDA confirmed that its ethical rules govern members' conduct:

CDA, which represents about 70% of the state's dentists, requires that members follow the law and the organization's code of ethics. The association enforces compliance; violations can result in expulsion (CX-1442-B).

132. CDA's components have agreed with it that the ethical rules which it establishes, including advertising rules, shall be the rules by which all members are governed (CX-1263-B, CX-1281-S, T, CX-1290-C, CX-1315, CX-1410-A).

133. Section 10 of the CDA Code establishes the standard which its members' advertising must satisfy:

Although any dentist may advertise, no dentist shall advertise or solicit patients . . . in a manner that is false or misleading in any material respect. . . . (RX-64-B).

134. In addition to the Code's standard, CDA relies on California law (which is incorporated into the Code), the regulations of the Board of Dental Examiners, and on

sections of the Business and Professions Code (Tr. 1082; RPF 60; RX-136-A-E) to provide advertising standards which it enforces through the Judicial Council (RPF 66-69).

F. Reasons For CDA's Advertising Policy

135. In 1976, CDA's president noted that:

[d]entists as a whole are in a position now where they can determine their own fees and treatment modalities without being overwhelmed by market pressures, regulated profits, etc.

136. He then warned that:

[If CDA does not survive] we [will] all end up in a frenzied competition for patients on the basis of fees alone . . . It comes down to the potential of each of us being pitted against each other, for fees, to attract patients, and eventually dental care would be downgraded (CX-1623-A-B).

137. This aversion to competition has continued. For example, in December 1987, the executive director of a component, in forwarding an advertisement to CDA, stated:

This dentist is not in our area, Glendora is in the San Gabriel Valley component; however, if you wish me to handle this, I would be happy to do so, Italian style!!! Just let me know. These Drug Store Ads make me sick (emphasis in original) (CX-547).

138. In 1988, referring an advertising matter to CDA, one of its component members stated: "[m]uch of the advertising is in newspaper/flyer type. Perhaps [dentists] would be willing to change or stop this type of advertising" (CX-941). Also in 1988, the editor of a component newsletter stated:

The ethical code . . . discourages the advertising of superior services lest we return to the days when unscrupulous operators defamed the dental profession for personal gain (CX-1392-B).

139. In 1989, the president of another component, writing in its newsletter, generally disparaged advertising and warned members against individual advertising, noting, among other things, that because of a "busyness" crisis (a term coined by CDA in referring to dentists' complaints that they did not have enough business) many dentists had begun to advertise:

I am increasingly disturbed at not only the degree but the nature of advertising occurring in our profession today . . . [A 1978 study found that the group] most likely to seek the services of an advertising dentist is a large family headed by a male with an annual income lower than \$15,000 (1978) and a strong belief that dental fees are too high. Is this the type patient you want to make up your practice?

The patients responding to advertising are, according to [other] studies, already "on and off" patients that drift from practice to practice with little or not loyalty or bond to their doctor. . . . If the shining image of dentists is tarnished by aggressive advertising we may be viewed as wholesale tradesmen rather than honored professionals (CX-1359-B).

140. In 1994, Dr. Quint, an Ethics Committee Chairman, testified that he conducts what he calls an "indoctrination meeting" with new members of his component (CX-1608-V); at this meeting, Dr. Quint advises:

Then I say does advertising pay. I say it is not cheap. The PennySaver costs -- If you want to send out a list of PennySavers for everybody. I don't know what it is right now but it used to be about \$1500 for a postal zone. That's expensive. Telephone books is about \$500

for a half a page, \$500 a month. Fliers, you can take them to patients' houses and leave them on their door. I have one dentist that did that and he got no patients whatsoever out of it. People just do not go to the dentist because they see a flier. That's my opinion.

What kind of patients do you get when you advertise? You get coupon clippers, one-timers, nonrefers, and your old patients then will say how come I don't get the deal. How come you can't give me a discount? Here's my coupon. I know that from experience of having a person in my office who did advertise (CX-1608-Z-1).

#### G. Enforcement of CDA's Advertising Policy

##### 1. Dissemination of Policy

141. CDA includes its Code of Ethics in materials it provides to new members and applicants and they receive a copy of the Code annually (CX-1244-A, CX-1608-X).

142. CDA also furnishes articles concerning advertising enforcement to its components for inclusion in their newsletters and distributes copies of its Advertising Guidelines and Code to participants in its ethics workshops (Tr. 1437-38; CX-1219-B, CX-1161-A-E, CX-1244-A, CX-1248-H).

143. CDA also sends copies of its Code to non-members, such as dental schools, who it believes can assist it in enforcing the Code's advertising policy (Tr. 884; CX-1198, CX-1219-B, G, CX-1248-H, CX-1606-F, CX-1607-F, CX-1608-F, Z-35-37, CX-1214-B, CX-1367-A).

##### 2. Review of Advertising

144. Applicants for CDA membership are required to submit copies of their advertising and advertising by employers and associates (TR. 685; CX-1431-B).

145. Components considering applications for membership list applicants' names in their newsletters and ask that members send them information regarding ethical problems of which the members are aware (CX-1333-D).

146. At the behest of CDA, many components review yellow pages advertising every year to discover possible Code violations (Tr. 472-73, 932-33; CX-1243-D, CX-1253, CX-1268, CX-1283-H, CX-1292; CX-1305-G, CX-1324-C, CX-1338-B, CX-1342-B, CX-1352, CX-1361-B, CX-1371-A-B, CX-1378-B, CX-1404-F, CX-1413, CX-1446-H, CX-1577-Y-Z-2, CX-1608-Z-11-12, CX-1610-V, CX-1611-Z-7).

147. CDA requires that members who enter into settlement agreements to modify or terminate existing advertising submit future advertising for review and prior approval (see, e.g., CX-57-C-D). CDA and its components require applicants who have been granted conditional status to submit advertising for review and prior approval for one year (CX-52-B).

148. CDA requires its components to check the advertising of straying members (Tr. 1354, 931; CX-1195, CX-699, CX-1371-A-B), and some members who have complained about another's advertising have monitored future advertisements for compliance (Tr. 931).

### 3. The Enforcement Role of CDA and Its Components

149. CDA and its components have agreed to procedures for enforcing the Code's advertising rules: the components undertake an initial investigation into charges of Code violations and, where possible, resolve the matter at the local level (CX-1579-Z-6-7). One component ethics committee chairman stated that the committees are "agents of liaison between [CDA's] Judicial Council and the members of [the component], to monitor the ethical practice of

dentistry" (CX-1403-E) (see also Tr. 507, 854, 1355; CX-1610-Z-37).

150. When reviewing questioned advertising, component ethics committees take into account CDA's instructions (Tr. 1339-40), and CDA, in some cases, monitors components' advertising enforcement (CX-478-A-B).

151. Components usually follow CDA's advice on advertising issues (Tr. 854-55, 1355; CX-177-Z-4, CX-1608-Z-7, Z-37, Z-45-46).

152. CDA and its components have agreed that when the components cannot decide whether a particular advertisement violates the Code or when local efforts at resolving advertising issues fail, the matter will be referred to CDA (Tr. 1441; CX-1260, CX-1577-Z-9, CX-1579-Z-6, CX-1603-Z-22).

153. If, during the initial investigation, a member's advertising is questioned, the ethics committee looks into the matter. If an applicant's advertising is questioned, the membership committee begins an investigation (CX-642, CX-969-A, CX-1243-D).

154. In some components, questioned advertising is reviewed by the ethics committee as a whole; in other components, an individual committee member handles such matters (Tr. 479-80, 847-48, 927-28).

155. When a component finds that an applicant's advertising violates CDA's Code, it tries to settle the matter by contacting the applicant and asking that he modify or discontinue the advertising (Tr. 690-91; CX-1606-Z-5-6).

156. If the component fails to resolve the matter, or is not certain that the advertisement violates the Code, it forwards the application to CDA's Membership Application

Review Subcommittee ("MARS") for resolution (Tr. 1023; CX-1409-E, CX-1603-Z-24-25, CX-1606-Z-8).

157. MARS is a subcommittee of CDA's Judicial Council which reviews membership applications to ensure that applicants have complied with CDA's ethical rules (Tr. 1023, 1440; CX-1219-A, CX-1259-B, CX-1484-Z-27-28).

158. After MARS has decided whether an advertisement does or does not violate the Code it makes a recommendation to the referring component. Recommendations include: full membership; acceptance with counseling; "conditional applicant status"; or, denial of membership (Tr. 1026-29; CX-118-B, CX-248-B, CX-1589-S-T, CX-1026, CX-1608-Z-8-9, CX-1606-Z-8-9, CX-1609-Z-3).

159. In one of its recommendations concerning an application, CDA told the component:

Pursuant to action taken by CDA's Board of Trustees in December 1980, CDA will extend financial assistance in the event litigation ensues from the component's membership decision only if the component: 1) follows the recommendation of the MARS; and 2) advises the applicant of its membership decision within six months of the date of this letter. (See, e.g., CX-864-B).

160. Until about 1985, CDA denied membership to any applicant who advertised in a manner that violated CDA's advertising rules (CX-1215-A), and the applicant was invited to re-apply in one year (see, e.g., CX-1058-C).

161. Beginning in about 1986, CDA established a membership category that it refers to sometimes as "conditional applicant" status and sometimes as "pending member" status (see, e.g., CX-993, CX-1243-U). This status was originally designed for first time applicants who were new graduates (within two years of graduation) (CX-1416-E). It can only be granted once, for a one-year

period (CX-1243-U), and only CDA (through MARS) can approve this status (CX-1178-A).

162. "Conditional applicant" status is available solely to dentists whose advertising violates CDA's Code, and who are unable to correct the advertising immediately. It is granted only to applicants who agree to correct the advertising in question as soon as possible, and to cease using the improper advertising representation (CX-1178-A).

163. Dentists who are "conditional" applicants do not receive the benefits of full membership; for example, they may not hold office or advertise that they are members of CDA or ADA (Tr. 1027; CX-1243-U). Moreover, they do not have the right to a Judicial Council trial if they do not agree with the subsequent re-evaluation of their advertising (CX-1243-U).

164. Conditional applicants are given one year to bring their advertising into conformance with CDA's Code (CX-1243-U). At the end of the one year period, the component conducts an inquiry into whether the conditional applicant has brought his or her advertising into compliance, and reports its finding to CDA (CX-1243-U). A conditional applicant is either granted full membership in CDA or dropped from membership at the end of the year depending upon whether he or she has made the changes required by CDA within that time period (CX-1243-U).

165. Beginning in about 1990, MARS began granting full membership to applicants whose advertising was objectionable with the caveat that the component, whose real purpose is to obtain correction of objectionable advertising, "counsel" the dentist regarding such advertising (see, e.g., Tr. 1028-29, 1522-23; CX-375-C, CX-478-A-B, CX-866-A, CX-1613-A). In such instances, CDA or the components first ensure that the applicant is willing to change, or has changed, the objectionable advertising (see, e.g., CX-444-B, CX-648-A, CX-914-B), or that the component has received written assurance that the dentist will comply with CDA's

Code (see, e.g., CX-856-A-B). For example, in one recommendation to a component to accept and counsel an applicant, CDA emphasized that:

[CDA's recommendation of acceptance with counseling] is contingent upon [the applicant's] willingness to comply with your committee's requests in accordance with CDA's Code (CX-648-A).

166. In other recommendation, CDA advised a component:

Before MARS can recommend acceptance of Dr. Nicholl's application, it requires written assurance from Dr. Nicholl's [sic] that she will make the recommended changes contained herein, and ensure any future advertisements published on her behalf comply with the Dental Practice Act and the CDA Code (CX-775-B).

167. CDA informs applicants who are denied membership that they may reapply in one year or when the offending advertising is correct (see, e.g., CX-826).

#### 4. Advertising Claims That CDA Has Restricted

##### a. Price Advertising

###### (1) Representations of Low Price

168. Advisory Opinion No. 3 to Section 10 of CDA's Code prohibits references to the cost of a dental service unless the representation:

is exact, without omissions . . . [makes] each service clearly identifiable, without the use of such phrases as "as low as," "and up," "lowest prices" or words or phrases of similar import (CX-1484-Z-49, Z-50).

169. At various times (1988, 1990, 1991, 1993) some of CDA's constituents warned members about using "terms that

mislead" such as: "affordable" (CX-1363-C); "from," "between," "and up," "lowest prices" or any other implication of "bargains" (CX-1406-C); "affordable" or "reasonable" (CX-1318-B); comparative statements such as "from," "between," "as low as," "lowest prices" (CX-124-57-E); and, words such as "reasonable," and "lowest" (CX-1391-B).

170. Several component ethics officials testified that low price references are objectionable without regard to whether they are false or misleading (CX-1610-Z-12-13, CX-1608-Y) (see also Tr. 1738, 703, 716, 944-45; CX-1580-Z-33).

171. From 1982 to 1993 CDA and its components warned members about the use of low price claims. For example, CDA recommended denial of an application because the applicant's use of the phrase "affordable family dentistry" was unverifiable and therefore inherently misleading:

Since there is no basis of comparison or knowledge upon which Dr. Hibbard could conceivably base his opinion that his fees are "affordable," this statement is false or misleading (CX-445-A).

172. In 1986, CDA recommended denial of an application, in part, because the applicant included in advertising the phrase "affordable dentistry" on the basis that it "implies Dr. Gyaami is offering lower fees than other practitioners, or that he is offering a 'bargain'" (CX-408-B) (see also CX-306-A, CX-391-B, CX-605-B).

173. Appendix E of complaint counsel's proposed findings lists exhibits in which CDA restricted representations of low prices without regard to whether the claims were truthful and nondeceptive. See also CX-1659-Z-42-48 which lists the various phrases used by its members to which CDA has, at one time or another, objected.

(2) Representations of Discounts

174. Without regard to whether discount advertising is false or misleading, CDA requires that discount offers include five disclosures: (1) the dollar amount of the non-discounted fee for the service; (2) either the dollar amount of the discounted fee or the percentage of the discount for the specific service; (3) the length of time, if any, the discount will be honored; (4) a list of verifiable fees; and (5) identification of specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount (CX-1262-I).

175. Since as far back as 1983, and continuing through 1993, CDA and its components have objected to across-the-board discounts (discounts on each service provided) that do not include at least the regular fee for each discounted service:

Sr. Citizen Discounts (1982)  
(CX-753-A) (Dr. Mowery)

discount for cash; senior/family discounts (1989)  
(CX-806) (Dr. Ghatnekar)

20% senior discount; 20% military discount (1991)  
(CX-684-A) (Dr. McGreevey)

Senior citizen and military discount (1992) (CPF 894)  
(CX-926) (Dr. Scott)

sr. citizen discounts; 40% off our regular prices for any treatment; excludes orthodontics; offer expires 3/15/93 (1993) (CPF 921)  
(CS-467-B-C) (Dr. Iskaq)

discount for all new patients (1993)  
(CX-387-A) (Dr. Ghadimi)

senior citizen/military/student discount (1993)

(CX-333-A, F) (Dr. Dorotheo).

176. A number of component ethics committee chairmen, as well as the current Chairman and a former chairman of CDA's Judicial Council, testified that across-the-board discount offers that do not include at least the regular fee for each discounted service, are objectionable without regard to whether they are, in fact, false or misleading. For example, Dr. Nakashima testified that dentists cannot advertise, without the required disclosures, across-the-board discounts such as "senior citizens discount," and "discount for all new patients," even if the claims are true, and even if the advertiser has appropriate substantiation (Tr. 1742-43). (See also, Tr. 1064, 1067; CX-1577-Z-20-21, CX-1606-Z-20, CX-1608-Z-32).

177. One of CDA's components warned its members that its discount advertising requirements came close to a ban on discount advertising:

[T]he CDA Code of Ethics information requirements are nearly prohibitive - fees, %discount, length of time, etc. (CX-42, CX-589, CX-972).

178. In 1988, one of CDA's components made the same point:

The first mistake is advertising a discount. This is against ethical practice in the State of California. The second mistake, is advertising a discount fee without advertising the original fee (CX-806-A).

179. Dr. Miley, who was put on trial by CDA for our objectionable advertisements, testified that CDA's discount advertising rules effectively preclude across-the-board offers because, in order for a dentist to advertise in compliance with CDA's rules, he would have to include the regular fee for one hundred to three hundred different procedures. He concluded: "even though everybody said at the trial it was

legal to advertise, the fact is you couldn't and meet their guidelines" (Tr. 360-61).

180. Dr. Kinney, a current member of CDA's Judicial Council, testified that literal application of CDA's discount advertising rules would not make sense:

[T]hat kind of ad would probably take two pages in the telephone book [and] [n]obody is going to really advertise in that fashion (Tr. 1372).

181. Dr. Cowan, a component ethics committee chairman, testified:

We wouldn't expect someone to list the prices of each and every service. Do you realize how many services there are that a dental office provides? . . . I mean, that would be totally unreasonable to expect them to list every single fee and the amount of the discount (Tr. 1593-94).

182. Appendix D to complaint counsel's proposed findings lists exhibits in which CDA restricted discount claims without regard to whether the representations were truthful and nondeceptive. See also CX-1659-Z-27-40 for a list of documents which reveal that, at one time or another, CDA has objected to discount claims by its members.

b. Non-Price Advertising

(1) Quality

183. In 1982, CDA informed its members that quality claims in advertising violated the Code of Ethics (CX-1228-A), quoting Advisory Opinion No. 8 to Section 10 of the Code which is still in effect:

Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly,

such claims are likely to be false or misleading in a material respect (CX-1484-Z-50).

184. A checklist used as recently as 1992 by one of CDA's components to inform members that their advertising violated CDA's Code included in a list of categories of phrases under the heading "Prohibitions":

use of words relating to quality of performance such as "high level," "fast results," and "progressive" (see, e.g., CX-731-A).

185. In October of 1993, one of CDA's components warned its members in an "ETHICS UPDATE" that they should not use the term "quality" in advertising ("DON'T: Use terms that mislead: i.e., 'quality' . . .") (CX-1363-D).

186. A number of component ethics committee chairmen testified that advertisements that include the word "quality" are objectionable without regard to whether they are, in fact, false or misleading:

The use of the word quality in any form is misleading because it's nonspecific and it implies superiority (CX-1610-Z-23);

The use of the word quality and perhaps the use of the word gentle are two unverifiable and unsubstantiable terms (CX-1610-Z-28);

Q On the occasions that a dentist would use the word "quality" in advertising, would you consider that an unacceptable superiority claim?

A I think the little blurb on advertising guidelines suggest that you don't use "superior quality" as an advertisement (CX-1577-Z-36-37).

(See also, Tr. 706; CX-1608-Z-42 (quality claims are objectionable "because there is no way to prove it")).

187. In 1993, one of CDA's components objected to an applicant's use of the phrase "quality care for less" but did not make any request for substantiation, and made no inquiry into whether the claim was in fact false or misleading; the component simply stated its objection, and directed the dentist to correct the advertising and to acknowledge, by checking a form supplied to him by the component, that he either had "discontinued" the advertising or "will alter or have altered the advertising to conform to" CDA's Code (CX-366-A, B).

188. In 1993, one of CDA's components objected to an applicant's use of the phrases "render personal quality dental care," and "providing you with the best in treatment" on the basis that "quality services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in a material respect" (CX-120-B).

189. In 1989, CDA notified a dentist that his advertising violated the Code since "you are advertising that your dental office provides superior dental services" because of these statements:

We believe quality in dentistry is never an accident. It is the result of caring, effort, and wise decisions. ("Implies that other dental offices do not put as much effort, care, etc., into achieving and providing quality dental services as your dental office.") (CX-868-A).

[W]e cater to those people that demand quality, personal attention, and punctuality. ("Implies other dental offices do not cater to patients with these demands.") (CX-868-A).

190. In 1986, CDA recommended denial of an application because, among other things, the applicant had advertised "claims as to the quality of services that are not susceptible to measurement or verification":

gentle dentistry team;

gentle, caring dental team

the dedicated professional . . . at Silver Ridge

quality dentistry with a touch of tenderness

quality dentistry in a pleasant and positive manner

the sensitive hygiene team

leading edge technology

you shouldn't have to wait hours or days for dental care. The team at Dr. Reid's is ready to help when you need them (CX-846-A-B).

191. In 1982, CDA notified one of its components that one of its members' advertising was objectionable because, among other things, it included a claim of quality: "we make the finest dental care easy for you" (CX-107-A). CDA did not direct the component to request substantiation for the claim, or to make an inquiry into whether the claim was in fact false or misleading; rather, it simply directed the component to request that the dentist "delete the word 'finest' from future advertisements" (CX-107-A).

192. In responding, the component ethics committee chairman stated:

It was very difficult for Dr. Brown to understand why words like quality and finest were in violation and I can see his point of view (CX-108-A).

193. Appendix F to complaint counsel's proposed findings lists exhibits in which CDA restricted quality claims without regard to whether the representations were truthful and nondeceptive. See also CX-1659-Z-50-59 for a list of

documents which reveal that, at one time or another, CDA has objected to quality claims by its members.

(2) Comparative and Superiority Claims

194. In 1982, CDA informed its members that claims of superiority violate the Code (members should avoid the "implication of superiority") (CX-1228-A). In that same year it warned its members to avoid claims that imply professional superiority (for example, "comfortable") (CX-1229-A).

195. In 1988, the editor of a component newsletter advised its members that:

The ethical code . . . discourages the advertising of superior services lest we return to the days when unscrupulous operators defamed the dental profession for personal gain (CX-1392-B).

196. In 1991, one of CDA's components warned its members:

You must avoid any inference of superiority, such as "high level," "progressive," "fast results," "modern," "latest," "new," etc. (CX-1406-C).

197. Other components warned members about the use of superiority claims:

The general message is that the advertisement to the general public may not be deceptive or show superiority over other practices (CX-1629-B) (in 1993).

Superiority claims in any form will guarantee problems with the California State Board and the CDA (CX-1363-C-D) (in 1993).

one of the "two most common mistakes" in advertising is:

using words that imply superiority of service, i.e., "newest," "latest," or "progressive" (CX-1627-F) (in 1993).

198. A number of component ethics committee chairmen, as well as a former chairman of CDA's Judicial Council, testified that they object to all statements that they believe imply that the advertising dentist is superior to other dentists, regardless of whether the claims are, in fact, false or misleading:

[phrases that] impl[y] an essence of superiority by [the advertising dentist] as in relationship with the dentists . . . violate [CDA's] Code of Ethics (CX-1610-Z-12).

I don't think you can legally advertise, that you are superior to anybody else. . . . You can't imply superiority (CX-1608-Z-15).

And how in heaven's name does any member of the public ever verify that [a dentist's service] is actually superior? (CX-1579-Z-13).

(See also Tr. 691-92, 716; CX-1580-Z-4); Tr. 880 (superiority claims are objectionable because they can never be substantiated); Tr. 938 (claims that imply superiority, such as "I am more gentle than other dentists in my area" are objectionable because such claims "may be very hard to verify"); Tr. 1030; CX-1577-Z-13-14, CX-1603-Z-31-32, Z-62 (superiority claims are "absolutely" objectionable).

199. In 1983, CDA recommended denial of an application for membership on the basis that, among other things, the applicant used a phrase ("we care") that violates CDA's Code because the phrase "implies superiority, or that Dr. Hibbard cares more than another dentist" (CX-449-A).

200. In 1986, one of CDA's components notified an applicant that his advertising violated CDA's Code because, among other things, it included the phrases "new improved," "a visit to your dentist needn't be unpleasant," "my number one concern is your care and comfort" because:

These statements imply that one is professionally superior to other practitioners or that one is pleasant while others are not; that one is concerned where others are not; or that one has some "new" and better technique available (CX-238-A).

201. The record reveals many other instances in which CDA, a component, or an ethics committee member objected to quality or superiority claims because they implied that other dentists did not provide the same quality service:

You'll appreciate our warm personal attention (CX-978-A) (in 1988)

State of the art dental services (CX-1026-A) (in 1992)

gentle (CX-467-A) (in 1993)

gentle, painless (CX-24-A) (in 1993)

caring dentistry (implying that [the dentist] cares, implies that others don't, perhaps) (CX-1610-Z-32-33)

202. In another case, CDA advised a member that this advertising was objectionable because the claim "you will find our reputation is impeccable" "implies that other dental offices do not have impeccable reputations" (CX-868-A-B, CX-626-A).

203. Dr. Kinney testified that a representation would be an objectionable superiority claim if the dentist is "claiming that they have something that sets them apart from the rest of the profession, that no one but themselves has the ability to

either utilize this technique or understands it well" (CX-1578-Z-17).

204. Appendix G to complaint counsel's proposed findings lists exhibits in which CDA restricted superiority claims without regard to whether the representations were truthful and nondeceptive. See also CX-1659-Z-61-71 for a list of documents which reveal that, at one time or another, CDA has objected to superiority claims by its members.

### (3) Guarantees

205. Quoting state law, CDA has, as a practical matter, barred the advertising of guarantees by its members without regard to whether the offers are false or misleading. See e.g., CX-1017-A in which CDA, asserting that state law "prohibited" guarantees, stated:

Any violation of state law related to the practice of dentistry or unprofessional conduct as defined by the Dental Practice Act renders members liable to disciplinary action by the association according to Section 5 of the CDA Code of Ethics.

(See also CX-98-A, CX-354-A, CX-557-C-D, CX-497-C, CX-391-C, in which CDA made similar statements about member's advertisements, ignoring the fact that state law permits truthful, nondeceptive offers of guarantees (RX-137-B [1680(1)], RX-138 [651 (L)]).

206. The record contains many examples of CDA's objections to members' advertisements which offered or, according to CDA, implied a guarantee:

Our 15 year reputation is your assurance of personal satisfaction (CDA: "[i]n this context, the word 'assurance' is synonymous with the word 'guarantee'") (CX-644) (in 1985).

removable braces that can straighten your smile in as little as 6 months (CDA: "May imply Dr. Moga is guaranteeing a dental service") (CX-740-C) (in 1985).

we guarantee our work (CX-22-B) (in 1985).

satisfy your dental needs, or we will refund your money (CDA: [phrase] appears to be a guarantee for dental services) (CX-98-A) (in 1987).

Ask about guarantee (CX-274-C) (in 1992).

we offer the safest and most painless (CX-1000-C) (in 1992).

outstanding success rates (CX-354-A) (in 1992).

sure fit, comfortable dentures (CX-495-A) (in 1992).

crowns and bridges that last (CX-497-C) (in 1993).

we guarantee satisfaction (CX-484-B, D) (in 1993).

207. Several component ethics committee chairmen and a former Judicial Council chairman expressed their opposition to offers of guarantees without considering whether they are false or misleading:

I don't think you ought to be saying you guarantee something (CX-1577-Z-14).

Q In your opinion, does an advertisement that offers a guarantee, whatever the guarantee is, violate CDA's Code of Ethics?

A I would say anything about a guarantee, yes . . . (Tr. 1047).

See also Tr. 937, 1456-57, CX-1603-Z-49, CX-1606-Z-15, CX-1611-Z-36.

(4) Consumer Anxiety

208. In 1984, one of CDA's components objected to an applicant's use of the phrase "gentle, quality care" (CX-799). The component advised the applicant that before his application could be completed, he would need to submit a written statement agreeing to cease using this phrase "and other terms which violate" CDA's Code (CX-799).

209. In 1983, CDA objected to a member's advertising because it included, among other things, the phrase "special treatment for nervous patients" (CX-367-B).

210. In 1985, CDA objected to advertising by an applicant's employer because it included, among other things, the phrase "special care for cowards" (CX-608-A).

211. In 1986, one of CDA's components notified an applicant that his advertising violated the Code because it included, among other things, the representations "a visit to your dentist needn't be unpleasant," and "my number one concern is your care and comfort" (CX-238-A).

212. In 1988, one of CDA's components objected to a member's advertising because it included, among other things, the words "sensitive" and "caring" (CX-761).

213. In 1991, one of CDA's components notified a member that is advertising did not conform to the Code because it included, among other things, the phrase "provide you with special service and comfort" (CX-684-A).

214. In 1992, one of CDA's components objected to an applicant's advertising because, among other things, it included the use of words relating to apprehensions of patients ("gentle dental care") (CX-767-A).

215. In 1993, one of CDA's components objected to an applicant's advertising because, among other things, it included the word "gentle" (CX-467-A).

216. Appendix C to complaint counsel's proposed findings lists exhibits that reflect CDA's restrictions on representations addressing consumers' fears and anxieties concerning dental care.

### 5. Materiality & Falsity

217. When CDA or its components analyze members' advertising claims, they purportedly apply the "false or misleading in a material respect" standard (CX-1484-Z-49); however, they have ignored this standard in some cases by overlooking the importance which challenged claims might have to consumers.

218. CDA and its components have objected to advertising to which, they assert, no one pays attention. For example, Dr. Quint testified:

When you use misleading statements, many people will say that's just a misleading statement and just don't pay any attention to it. That's why we tell our members don't bother using misleading statements because they are against the law and nobody pays any attention to them anyway (CX-1608-Z-19).

219. Dr. Lee, currently a member of CDA's Board of Trustees (Tr. 1007-09), testified that while he does not know whether discounts are important to consumers, discount offers violate CDA's Code if they do not include the regular fee for each discounted service (CX-1589-I, Z-48-49) (see also CX-1577-K-L, Z-2-3).

220. CDA and component officials charged with enforcement of the Code's advertising restrictions have, in several cases, equated the "material respect" standard with "misleading." An example of this approach is expressed in a component's 1990 newsletter:

Interpretation of "material respect" is a matter of degree. If an ad is obviously and demonstrably false or

misleading, then it must also be false in some material respect. If an ad contains only slight misrepresentations of fact that would not deceive a prudent person, then the "material respect" rule has not been violated (CX-1252-C).

221. In trial testimony, Dr. Lee defined "material respect" as "[w]ould someone be misled reading the advertisement" (CX-1589-Z-30), as "[s]omething that I guess you can put substance to" and as "something indicating superiority"; furthermore, he could not explain what was "material" about certain advertising claims that CDA had challenged (Tr. 1042-43).

222. In addition to their confusion about materiality, CDA or its components have applied their own advertising standards in place of "false and misleading" for certain claims regardless of the truth of such claims:

Claims that may "insult the public" (CX-1611-Z-44-45; Tr. 947-49)

Claims that were insulting or offensive to a dentist's peers (Tr. 961-64)

Claims that should be removed from an advertisement so that dentist's peers would feel more comfortable (CX-359-A)

Vague or ambiguous claims or claims the public would not understand (Tr. 944; CX-1611-Z-36-37)

Subjective claims (CX-48-H, CX-945-A)

Claims that do not "lift the image of the profession in the eyes of the public" or conduct which does not "elevate the esteem of the profession" (CX-1484-Z-49, CX-1611-Z-45, CX-115-A)

If advertising lists more than one location or uses fictitious name, unless approved by state (CX-745-C-D, CX-333-B)

Use of religious or ethnic affiliation in advertising (CX-1318-B).

#### 6. Substantiation

223. In many instances, CDA and its components have restricted members' advertising on the ground that certain claims are inherently unverifiable. For example, the following claims were objected to (material in parentheses are comments by CDA or a component):

"a group of dentists dedicated to quality dental care at low cost" (implies superiority, not verifiable, and includes use of lowest price) (CX-373-B-C);

"comfortable and personalized" (CX-1078-A; unverifiable);

"latest equipment and gentle, caring techniques" ("Advertising claims as to the quality of services are not susceptible to measurement or verification. Accordingly, such claims are likely to be false or misleading in any material respect") (CX-759); and

"gentle, caring, qualified dentist" (implies superiority, raises unjustified expectations, and is not verifiable) (CX-413-B).

224. Some ethics committee chairmen, and a former chairman of CDA's Judicial Council, testified that certain advertising claims are inherently unverifiable. These claims include: "State of the art" (Tr. 880, CX-1580-Z-29); claims of low prices or quality claims (Tr. 1053, 1071); "affordable" or "reasonable" fees, "latest in dentistry," "quality gentle care" "caring" (Tr. 483-84, 490-91; CX-1610-Z-13, Z-17, Z-27-28, Z-32-33); all superiority and quality claims

(CX-1608-Z-17, Z-52-53, Z-41-43); "more gentle than other dentists in my area" (Tr. 938).

#### 225. One of CDA's components warned a member:

We would like to remind you that a fee survey - whether conducted formally or informally and by an individual or the dental society - is illegal and can be construed as price-fixing by the Federal Trade Commission. At this time the FTC is pursuing a lawsuit involving just this type of situation and it is being watched closely by the ADA. Your colleagues are restricted by law from relaying their fee schedule to other dentists - and we would ask that you keep in mind that the word of patients is not always totally reliable (CX-1293-A). (See also Tr. 490-91).

#### 7. Verification by the Public

226. CDA components have objected to advertising claims because they are not verifiable by the public. For example:

In May of 1993, one of CDA's components informed a member that his advertisement violated the Code, in part, because the phrase "high quality dental services" suggests unique or general superiority to other practitioners [and] is not susceptible to reasonable verification by the public (CX-63-A);

Also in May of 1993, one of CDA's components objected to an applicant's use of the phrase "gentle" because, among other things, "statements should be avoided which contain a representation or implication regarding the quality of dental services which would suggest unique or general superiority to other practitioners which are not susceptible to reasonable verification by the public" (CX-467-A);

In June of 1993, one of CDA's components objected to an applicant's use of the phrase "with the utmost degree of professional care" because, among other things, it is a quality claim that suggests superiority that is not susceptible to reasonable verification by the public (CX-120-B); and

In November of 1993, one of CDA's components objected to an applicant's use of the phrase "[we] render personal quality dental care" because it is a "representation or implication regarding the quality of dental services which would suggest unique or general superiority to other practitioners which [is] not susceptible to reasonable verification by the public" (CX-381-B).

227. A number of component ethics committee chairmen, as well as Dr. Nakashima, the current chairman of CDA's Judicial Council, testified at trial and in depositions about verification of advertising claims by consumers. Dr. Lukens testified that the word "best" is objectionable because "it implies superiority and is undeterminable by the public" ("[i]f the public was to read that advertisement, they would have no way of judging whether this dentist was better or worse than another dentist") (CX-1610-Z-10-11).

Dr. Abrahams testified:

Well, semantically how does one arrive at the ability to say that a practitioner offers something that's superior to what another practitioner offers, how does one verify it? How could the same thing, on the same realm, how does one know that one is offering -- as a consumer now, reading the advertisement -- how does one know that the prices are cheaper than someone else's (CX-1579-Z-20).

228. At trial, Dr. Lukens testified that an advertisement would be false or misleading if the general public would be unable to determine the truthfulness of the advertisement

"just by reading it" (Tr. 486), and agreed that "representations that consumers cannot verify on their own from the ad are violations of Respondent's code" (Tr. 509). Dr. Nakashima, in explaining his concerns about the phrase "we are dedicated to maintaining the highest quality of endodontic care," testified:

A Well, the statement needs to be verified in that it needs to state what specific manner of service qualifies them to say "the highest quality of endodontic" -- they need to spell out what it is that assures the patient the highest quality of -- what is it that they do that assures the patient the highest standards, the highest quality. They need to be able to validate and verify -- he needs to spell out what it is that he does makes the statement correct.

Q And he needs to do that in the ad, is that correct?

A Yes.

Q And even though he can verify it, has adequate substantiation, the dentist cannot advertise this phrase unless that substantiation is in the --

A It must be in the ad.

Q -- in the ad?

A Yes (Tr. 1545).

The next day, the Doctor testified that advertising does not need to include the required substantiation in order to comply with CDA's Code of Ethics (Tr. 1717-18).

229. CDA has also objected to the phrase "a caring gentle dentistry team," because it was not possible for a patient to verify claims such as "we care" (CX-737-B). In another matter, CDA objected to "affordable" because the

public purportedly has no means to measure such claims (CX-596). A component also objected to an applicant's use of the word "trustworthy" for the same reason ("statements shall be avoided which would contain a representation or implication regarding the quality of dental services which would suggest unique or general superiority to other practitioners which are not susceptible to reasonable verification by the public") (CX-391).

#### H. CDA's Reliance on State Law and Regulation

230. Although not an agent of the State of California (Ans. at ¶ 10), CDA's advertising policies look for guidance to the Dental Practice Act, the Business and Professions Code, and regulations of the State Board of Dental Examiners (Tr. 1447-50, 1468-69; RX-136-A-E, RX-137-A-C, RX-138-A-G).

231. CDA takes an active role in enforcing advertising restrictions because it believes that, due to budget constraints, state agencies are not enforcing the laws on advertising (see CX-1442-A, CX-1444-A: "[t]he State Board of Dental Examiners has listed advertising enforcement dead last on its priority list"). (See also Tr. 1469-70; CX-1390-B, CX-1350-A, CX-1445-D).

232. The Chairman of CDA's Judicial Council testified that the President of the Board of Dental Examiners told him that "the only reason that there doesn't seem to be a strong emphasis on that [advertising] by the Board is due to budgetary constraints and staff constraints" (Tr. 1469-70); and, the former Chairman of CDA's Judicial Council, and a current member of CDA's Board of Trustees, testified:

[T]he board's capacity regarding advertisements is very, very low. I have never seen a case where the board has actually restricted or told anyone that their advertising was in violation of state law. . . . [Advertising is at or near the bottom of the Board's priority list] because the

Board, because of budgetary restraints, has no money to go out and enforce that (Tr. 1034, 1038).

233. Other statements by CDA echo this sentiment:

[State law has] not been enforced by the state Board of Dental Examiners because of budgetary restraints. CDA is filling a void (CX-1442-A).

The state Board of Dental Examiners has listed advertisement enforcement dead last on its priority list. . . . The FTC doesn't do much enforcement either. [Respondent] does it because it needs to be done (CX-1444-A).

CDA is basically doing what the state agency should be doing. We are being sued because of [a] Code of Ethics that says 'must abide by the rules and laws of the state' which is the Dental Practice Act. Because the Board of Dental Examiners does not have the funds to enforce the advertising portions the FTC is saying CDA should not (CX-1390-B).

[Respondent's position is that] our code only enforces state law, which the BDE [Board of Dental Examiners] have so far been unwilling to enforce (CX-1350-A).

Manpower and priorities limit most of the board action to warning letters and follow-ups based only on complaints from other dentists (CX-1445-D).

[I]f Dr. Miley has his way and the CDA went after no one for discipline until the state board had, then the majority of the violations in the state would go unaddressed, they would go unaddressed for nonmembers, they would go unaddressed for members. No advertising violation would ever receive any kind of discipline whether it be a reprimand or a suspension or expulsion (CX-724-Z-161-62) (Argument by prosecutor at a CDA disciplinary hearing).

234. CDA's attempts to enforce state law have resulted in confusion about the appropriate standards which should be used when judging members' advertising. For example, during the trial a CDA representative agreed that § 1680(i) of California's Business and Professions Code did not prohibit superiority claims that are truthful and no deceptive (Tr. 1477-78); yet, from 1982-1993, CDA took the position that all claims of superiority were unlawful:

Claims of superiority are proscribed by Section 1680(i) of the Dental Practice Act and thus violate Sections 5 and 20 of the CDA Code of Ethics (1983 letter to a component from CDA) (CX-885-A).

Words denoting professional superiority or the performance of professional services in a superior manner are prohibited by Business and Professions Code Section 1680(i) (CDA's Advertising Guidelines) (CX-1262-G) (1988).

MARS also determined that by using the phrase "Highest Standards in Sterilization," [dentists] are advertising in violation of Section 1680(i) of the Dental Practice Act, which prohibits advertising the performance of services in a superior manner, as well as the previously cited Section 5 of the CDA Code of Ethics (CX-394-B) (1993 letter).

235. CDA objects to "quality" claims, equating them, at times, to superiority claims (see, e.g., CX-391-A); also, it has claimed from 1985-1993 that the Dental Practice Act imposes an absolute ban on guarantee offers (CX-22-B, CX-497-C). However, in 1985, the Board of Dental Examiners stated that it did not consider claims like "quality dental treatment" as superiority claims (CX-1622); and, during the trial a CDA representative testified that § 1680(i) of the Business and Professions Code did not prohibit all guarantees (Tr. 1478-79).

236. CDA has also, from 1986 through 1993, told its members that §§ 651(b)(4) and (c) of the Business and Professions Code imposes an across-the-board ban on representations of low prices (CX-832-B, CX-730-B, CX-32-A), but at trial, a CDA representative agreed that the Act does not prohibit all representations of low prices (Tr. 1479-80). Furthermore, the State Board notified CDA in 1986 that it did not object to the phrases "low fees," "reasonable fees," and "low cost" fees (CX-1426-A). (See also CX-1622).

237. From 1982 to 1993, CDA and its components have told their members that a Board of Dental Examiner's regulation concerning discount advertisements prohibits such advertising unless five elements are disclosed therein, a requirement which the Board modified in 1985 (CX-1622) but which CDA and its components continued to enforce. This requirement was so complicated that it essentially constituted an absolute ban on discount advertising:

Additionally, the words in the coupon "Presentation of this card allows one complete dental examination, x-rays, oral evaluation, and treatment plan at 25% discount for cash," violate the Dental Practice Act regulations for advertising a discount . . . (CX-445-B);

The referenced advertisement also contains the statement, "Senior Discount." The advertisement fails to list the dollar amount of the non-discounted fee for each service, and to inform the public of the length of time the discount will be honored. Therefore, the advertisement violates section 1051 of the regulations adopted by the Board of Dental Examiners . . . (CX-497-C-D, CX-855-A).

238. Requiring an advertisement offering a discount to senior citizens to list the dollar amount of the non-discounted fee for each service is, as a practical matter, a ban on discount advertising (F. 180).

239. Some witnesses understood that state law does not impose absolute prohibitions on certain kinds of advertisements; others were not so sure. For example, Dr. Lukens testified that representations of low prices violate the Dental Practice Act (Tr. 515-18) yet he did not know how the Board applies or enforces the Dental Practice Act regarding claims such as "prices as low as" or "lowest prices" (Tr. 535-36).

240. Dr. Soo Hoo testified that the Dental Practice Act prohibits advertising "anything about quality" (Tr. 706) but he has never asked the Board of Dental Examiners how they apply or enforce the Dental Practice Act regarding quality claims (Tr. 707).

241. Dr. Yee testified that he believes the Dental Practice Act prohibits offers of senior citizen discounts that do not include each disclosure set out in Board regulations (Tr. 955-56). However, he also testified that he does not know how the Board of Dental Examiners applies or enforces the Dental Practice Act regarding discount advertising (Tr. 956). Nor does CDA, according to Dr. Lee, when it decides that a dentist's advertisement violates state law, determine the position of the Board of Dental Examiners concerning low price, guarantee, or discount advertising (Tr. 1034-36, 1046, 1049-50, 1065-66).

242. Also, Dr. Nakashima testified that he does not know how the Board applies or enforces the Dental Practice Act and Board regulations concerning discount advertising, offers of guarantees that are truthful and non-deceptive (Tr. 1475-76), or offers of a senior citizen discount that do not include the disclosures listed in Board regulations (Tr. 1537).

243. Moreover, CDA and its components challenge advertisements which, by their very nature, could not be false or misleading in a material respect. Thus, it has objected to advertising a fictitious name without obtaining a permit (CX-333-A), and an advertisement which is not exactly as

approved by the Board of Dental Examiners . . . (emphasis in the original) (CX-543-B). CDA also objects to all advertising of ethnic or religious affiliations and referred to this objection at a 1990 ethics workshop (CX-1318-B; see also CX-731). CDA also challenges advertisements that include more than one location unless the state has permitted practicing at more than one location (CX-389-F).

244. CDA knows that California's attorney general has advised the Board of Dental Examiners that state laws and regulations pertaining to advertising must be enforced in a manner that is consistent with United States Supreme Court rulings with respect to advertising by professionals (CX-1425-D).

245. As early as 1986, CDA knew that the Board of Dental Examiners interpreted the statute concerning representations of low prices less strictly than CDA thought was warranted by the statute. Specifically, the Board informed CDA that it does not interpret literally a statutory restriction on the advertising of "low prices," and does not challenge representations such as "reasonable fees" or "low cost fees"; CDA insisted, however, that those representations are prohibited by the statute and asked for written confirmation of the Board's interpretation (CX-1426).

#### I. The Administration of CDA's Advertising Policy

##### 1. CDA's Advertising Standards

246. The standard against which CDA measured its members' advertising is set forth in Section 10 of its Code of Ethics, and has been unchanged from 1985 to 1993 (CX-1227-D, CX-1484-Z-49-50, CX-1577-Z-9-10, CX-1607-Z-8-9, CX-1610-Z-7). The standard during this period was whether the challenged advertisement was "false or misleading in any material respect. (CX-1284-E, 1982 Code of Harbor Dental Society) or "false, misleading or

deceptive in a material respect" (1982 minutes of CDA's Judicial Council).

247. In 1993 CDA claimed that in reviewing advertising, it "applies the standard of false and misleading in a material respect to determine whether or not the advertisement in its entirety violates the CDA Code of Ethics" (CX-1205).

248. Dr. Lee, a former chairman of CDA's Judicial Council, instead of using the word "entirety," described the 1993 change as adding "totality" to the standard (CX-1589-Z-18-19).

249. The meaning of the words "entirety" or "totality" is unclear. Dr. Nakashima suggested that "reviewing the advertising in its entirety" means that the greater the seriousness and number of the violations, the more likely that a dentist will be denied membership in CDA or a member will be cited to trial (Tr. 1725-26). On the other hand, Dr. Lee, a current member of CDA's Board of Trustees and a former member, and chairman, of CDA's Judicial Council, when asked about the meaning of "viewing an advertisement in its entirety," answered that he did not know what it was about the entirety of various advertisements that caused claims to be false or misleading (Tr. 1049, 1051; CX-1589-Z-28-29).

## 2. Guidance With Respect to CDA's Advertising Standards

250. Dr. Yee testified that the phrase "we cater to cowards," which was, at one time, unacceptable, can now be used (Tr. 964). He was then asked:

Q Has your committee gone back to that dentist and said, "We objected to 'we cater to cowards', before, but we are no longer objecting"?

A Not specifically that dentist, no.

Q So how would that dentist know that advertising that the society has objected to before was no longer objectionable?

...

A There is a component newsletter that comes out once a month in which, when it gets close to the time in which dentists are submitting their advertisements for the yellow pages, that we print the guidelines in which -- or in which we also state that we offer to review their advertisements. That's the way we disseminate information as to changes.

Q And do you recall the newsletter stating that "We cater to cowards" is now okay, and it wasn't before, or is it just that you set out the standard that you use?

A It's just that we set out the standard that we use.

251. Until 1988, CDA prohibited the following representations:

gentle dentistry; we cater to cowards (1983) (CX-971-B-C);

gentle, quality care (1984) (CX-799);

Fast and caring (1985) (CX- 675-A);

personalized (as in "complete personalized family dentistry") (1988) (CX-1106-A, B);

gentle dental care (1992) (CX-767-A); and

gentle care; gentle exams (1993) (CX-24).

252. In April 1988, CDA began to inform individual components or individual members that the use of the term

"gentle" did not violate its Code (RX-6), but CDA did not then notify either its entire membership or all of its components of this change, and a number of the components continued to tell its members and/or applicants that CDA's Code prohibited the use of the term "gentle." For example, components objected to:

gentle dentistry is an art (1991 letter from component to applicant) (CX-563-A);

the term "gentle" as in "gentle injections," "gentle exams," and "gentle care" (1993 letter from component to member) (CX-24-A-B); and

"gentle"; "we cater to cowards" (1993 component newsletter) (CX-1363).

253. While CDA was aware in November 1992 that at least one of its components continued to restrict the use of the word "gentle" (CX-933), it took no action until June 1993 to notify the remainder of its components that the use of that word was acceptable (CX-1205). Even after this date at least one component continued to question whether the use of the word "gentle" was consistent with CDA's Code (CX-783).

254. Over the years, CDA has taken inconsistent positions concerning the word "reasonable." In 1985, it notified its components that while the use of the word "reasonable" in advertisements previously had been considered acceptable, it no longer was acceptable because "reasonable" is an inexact reference to the cost of dental services, and along with the term "affordable," "may violate [CDA's] Code and state law and should be avoided." CDA directed the components "as soon as possible" to inform members of the information CDA was providing, referring this time to "violations" of the Code or state law (CX-1199-C).

255. In 1991, CDA changed its position, finding that the term "reasonable" was acceptable (CX-1223-D). This change was based on a 1978 decision -- re-discovered by CDA in 1991 -- by its Judicial Council that the word "reasonable" was not objectionable (RX-57).

256. In 1993, one of CDA's components advised a dentist that the phrase "reasonable fees" violated CDA's Code (CX-778-A).

257. Also in 1993, one of CDA's components objected to an applicant's advertising because, among other things, it included the representations "reasonable," "low prices," and "goes easy on your pocketbook" (CX-391-A).

258. Finally, in 1993, CDA itself recommended denial of an applicant for membership because, among other things, his employer's advertising included the phrase "reasonable fees quoted in advance" (CX-118-B).

259. One of the reasons for CDA's inconsistent interpretation of phrases used by its members in advertisements is the lack of a consistent procedure to inform members about changes in CDA's advertising rules.

260. Some of the problem lies in confusion about the role of CDA's Judicial Council and the component societies. For example, Dr. Nakashima testified that after his component asked CDA's Judicial Council about the use of "comfort" and "gentle treatment" and received a response:

Q And when you found what their response was, did you send out a memo with an indication to your members saying that it has now been determined that "comfort" and "gentle treatment" are acceptable terms?

A No.

...

We didn't feel that it was necessary for us to send a letter to all of our members about the determination of the Judicial Council. That has never -- we never perceived that as our role. . . . (Tr. 1489).

261. Interpretation and application of CDA's advertising rules varies between components. For example, Dr. Soo Hoo, the current ethics committee chairman for the Southern Alameda County Dental Society disagrees with Dr. Nakashima of the San Francisco component that advertising a senior citizen discount without all of the required disclosures violates the Code (Tr. 696, 1742-43).

262. Interpretation and application of CDA's advertising rules even varies within a component depending upon which committee handles a matter: while Dr. Soo Hoo of his component's ethics committee believes that across-the-board senior citizen discounts do not violate the Code, his component's membership committee has challenged this kind of offer and, in 1989, denied an application for membership because the applicant offered "Senior Citizen Special Courtesy Discount" (CX-1016-D-E).

263. Dr. Cowan, ethics committee chairman of the Tri-County Dental Society, testified that he does not object to advertising simply because it contains words such as "reasonable," "low, or "affordable" (Tr. 1574-75), yet, his component's membership committee notified an applicant in 1993 that her advertising violated CDA's Code because, among other things, it included inexact references to the costs of dental services ("reasonable," "low prices," "goes easy on your pocketbook"), and asked her to sign, date and return the component's letter to indicate that she "acknowledges" the component's objections and that she will comply with the Code (CX-391-B). Inconsistencies like this may be due to the lack of contact between ethics committee chairmen in some components and their counterparts on membership committees (see Tr. 475-76, 856, 933; CX-1607-Z-1-2, CX-1608-Z13-14). -

264. Such inconsistencies are inevitable because of CDA's failure to adopt a procedure which ensures that rulings on members' advertising are promptly and consistently sent to all members:

Q When you were on the Judicial Council, Dr. Lee, did you know how the components interpreted and applied CDA's Code of Ethics?

A Did I -- did I know?

Q Yes.

A No.

Q Did you know, when you were on the council, whether any component prepared and distributed any materials regarding advertising to its general membership?

A No.

Q And again this is when you were on the Judicial Council, did you know whether any component prepared and distributed any materials regarding advertising to give to applicants or new members?

A No.

Q Do you know whether any component has given its membership guidance concerning how to advertise consistently with CDA's code?

A No, I'm not aware.

Q Have you seen any component newsletters in which the component has given its membership guidance on how they could advertise consistently with CDA's code?

A No.

Q When you were on the Judicial Council, did you ever ask any of the components whether they were giving their members guidance on how to advertise consistently with CDA's code?

A No (Tr. 1015-16).

Dr. Nakashima, the current chairman of CDA's Judicial Council, testified similarly at his deposition:

Q Doctor Nakashima, how does the Judicial Council know, if it does, how the components are interpreting and implying CDA's code of ethics?

A I don't really know that we know specifically how the -- I think the only time we know is when they refer matters up to us and they fill out the form and -- if they're having trouble, I guess they have to spell out to us exactly what it is that they're having trouble with. So that's the only way we know -- is, as matters are given to us from the forms that they fill out or send to us. That's how we know there's a problem going on.

Q Doctor Nakashima, have you, as a member of the Judicial Council or as chairman of the Judicial council, ever reviewed any component materials that addressed advertising? And what I mean at this time is, I -- materials that the component is going to use in workshops or materials that the component is going to give to new members to apprise them of appropriate rules?

A No, we don't -- I don't individually review materials given out by the components to their new members, no (CX-1588-Y-Z-I).

J. The Effect of CDA's Advertising Restrictions

1. The Importance of Advertising

265. Dr. John Christensen, the owner of an advertising agency which specializes in dental advertising (Tr. 546, 559), testified that "the marketplace" [consumers] "told us that they are staying away from dentists because of this fear aspect" (Tr. 586) and that advertising emphasizing comfort will "absolutely" bring in more patients (Tr. 585); conversely, restrictions on quality of care advertising, or the advertising of discounts would affect both dentists and consumers:

The practitioners themselves, who -- if I am answering the question properly, the practitioners themselves that were not allowed to communicate these optimal benefits to their marketplace would not attract as many new patients into their practice. And I believe in that specific submarket and in a general sense there would be less people going to the dentist (Tr. 603).

266. Consumers of dental services select a dentist because of several factors. They include: price, including out-of-pocket costs, and discounted fees (Tr. 468, 588-89, 680, 778, 788-89, 857-58, 921, 1004; CX-1606-M-N, CX-1609-M, CX-1654-C); convenience (Tr. 680, 921, 1004; CX-1603, CX-1606-M); safeguards to prevent spread of disease (Tr. 578-79; CX-1588-K, L); sensitivity to fears about dental procedures (Tr. 585-88, 777; CX-1577-M, CX-1608-N, CX-1610-S); concern about their well-being (Tr. 576, 920-21; CX-1578-J, CX-1606-L-M, CX-1609-M, CX-1610-S); and information about the type and quality of service (CX-1589H-I-J, CX-1579-S-T, CX-1589, CX-1606-N, CX-1607-L-M, CX-1609-213).

267. Advertising which conveys the above information is important to consumers (Tr. 469, 527, 680-81, 922).

2. The Importance of CDA Membership

268. There are important reasons for California dentists to become a member of CDA; reasons which explain why, when a member or applicant's advertising is challenged, the dentist often chooses membership over advertising, and changes his advertising to conform to CDA's rules.

269. As an example, an applicant, who was denied membership in 1989, told one of CDA's components:

As you are well aware, membership in the dental society is a distinction which bears fruit educationally, economically, as well as enhancing my reputation in the community. Denial of membership in the society has serious adverse consequences to me and my practice, and I do not intend to take this matter lightly (CX-880).

270. In 1987, the attorney of a dentist who was denied membership in CDA because of his employer's advertising wrote to the component:

[The applicant] recognizes the advantages of membership in your organization. Membership would allow him to (1) take advantage of the insurance benefits that can be obtained only through [respondent], (2) take advantage of your excellent continuing education programs, and most important, (3) membership would enhance his reputation as a dentist due to the high standards your organization maintains (CX-789-B).

271. In 1985, an applicant who was denied membership in CDA told one of CDA's components:

One of my main reasons for joining the dental organizations was to have T.D.I.C. Insurance. I have an anesthetist who works with me to provide dental treatment under general anesthesia. T.D.I.C. is the

only company providing that type of coverage for the general dentist.

If I am denied membership in the dental association then T.D.I.C. will not renew my insurance coverage and I will not be able to get it back. (Please see enclosed letter from T.D.I.C.) Also, I will have to pay a large payment to maintain the coverage for the year I have been covered by T.D.I.C., so I do not want to change companys [sic], even if there was another company that will be offering coverage (CX-802).

272. In 1988, a dentist facing possible loss of membership told CDA:

I have been a member of CDA and ADA for many years and do not take lightly my possible loss of membership in the ADA due to what I feel are unnecessary and possibly illegal restraints on my ability to advertise. . . . Resigning my membership in CDA will cause me to lose my membership in the ADA which is the only national dental organization of import, and this greatly distresses me (CX-427-A, B).

273. In 1988, an attorney for an applicant denied membership in CDA informed the component to which the applicant had applied that it was "imperative" that reevaluation of his client be completed promptly to avoid termination of the applicant's professional liability insurance, which he had obtained through CDA:

Obviously, any termination of my client's professional liability insurance is likely to cause him significant financial detriment. Therefore, your prompt action is essential (CX-512).

274. CDA is so important to some members that they have hired lawyers to assist them in gaining, or retaining, membership (CX-56, CX-83, CX-506, CX-510, CX-526, CX-789, CX-860). Also, applicants denied membership in

CDA have reapplied for membership (CX-1038-C, CX-1041, CX-362, CX-1011-A, CX-1103, CX-659-B, CX-664-A, CX-666, CX-304-A, CX-308).

3. Member Compliance With CDA's Advertising Restrictions

275. Dr. Abrahams, the Santa Clara County component ethics committee chairman, testified that [t]o the best of my knowledge, every member of the Dental Association [his component] is compliant" with CDA's advertising rules (CX-1579-Z-38-39).

276. According to Dr. Hoey, the Redwood Empire component ethics committee chairman, "about 100%" of his component's members' advertising is consistent with the component's advertising rules (CX-1577-Z-44).

277. Dr. Quint, the San Gabriel Valley component ethics committee chairman, testified:

When I get a new phone book at home — in the office at home I'll thumb through it. We do not see any fractures [sic] anymore because these people are educated to what they can say and what they can't say. It's very rare that you'll see an illegal ad, and if you do see one, it's right on the borderline. . . . We don't see illegal ads in the phone books anymore, hardly at all (CX-1608-Z-12).

278. Dr. Green, the West Los Angeles component ethics committee chairman, estimated that the advertising compliance rate of the members of his component is in the 90th percentile (CX-1606-Z-27).

279. The Central Coast component ethics committee reported at the component's 1988 board meeting that "all current yellow page advertisements in GTE and Pacific Bell telephone books are within the ethical guidelines as set forth by CDA" (CX-1265-A). At a 1989 board meeting, the

component reported that the "SLO" directory had no violations (CX-1266-B).

280. In 1990, the Tulare-King ethics committee chairman reported that in the yellow page advertisements:

all display ads [in the telephone yellow pages] were reviewed & found to be in compliance for [component] members. Several minor errors in the listings section were noted & those not in compliance were contacted by individual Ethics Committee members (CX-1413).

281. In its 1989-90 annual report, the Kern County component reported that there had been no major incidents regarding advertising in the preceding year, only some minor infractions in the yellow pages listings (CX-1298-B), and in its 1992-93 annual report, the component reported:

This year has been a very quiet one for the ethics committee. This is due in large part because each of you is making the effort to follow our guidelines (CX-1300-C).

4. Changes to Challenged Advertisements by Members

282. From 1982 until 1993, CDA and its components have challenged hundreds of advertising representations which on their face are not false or deceptive (see CPF's 580-949 which analyze CDA's challenges to the advertisements of 393 dentists). Many dentists, whose advertising was challenged, agreed to modify it (Appendix B to Volume II of complaint counsel's proposed findings) despite the fact that modification or discontinuance of advertising could result in a decrease in patient volume (Tr. 272-74, 602-03).

283. Several component ethics committee chairmen testified that they did not know of a single instance where a member has refused to modify or discontinue challenged advertising (Tr. 86-63, 1353-56, 480, 689, 928;

CX-1606-Z-3-4, CX-1608-Z-35, CX-1609W), even when they disagreed with the component. For example, one dentist responded:

I disagree with your findings and know we could belabor the question for hours and come to no conclusion. Therefore we shall disagree agreeably. The statements in question will no longer be used in any mailings from this office (CX-480).

284. A group of dentists whose advertising was challenged because it included terms such as "fully modern" and "luxurious atmosphere" responded:

We take exception to being chastised for use of the terms "fully modern . . . luxurious atmosphere." To construe that these phrases imply superiority is a matter of opinion and subject to semantic disagreement. Indeed, to state that these terms are not verifiable is open to argument. The term "prices you can afford" should be taken in context. The phrase does not mean nor imply "lowest prices" (sec. 10 #3 & 4). Our philosophy is to strive for quality and our practice is to provide that at affordable prices. This is not a sales gimmick, it is policy.

Our intention is to work within the framework of CDA's code of ethics and we will be incorporating your recommendations in our new brochure. . . . While we agree to comply with your request, we feel that it is time that the Western Dental Association petition the California Dental Association to review the code of ethics (CX-145-A).

285. A dentist whose representation of low prices was challenged, responded:

Thank you for your written notice indicating that the Ethics Committee feels that my ad in the Santa Cruz Yellow Pages may be in violation to the Dental

Practice Act . . . and [CDA's] Code of Ethics . . . as it relates to the phrase "Fees that Fit a Family Budget."

I do not feel that the phrase above violates the Code or the cited Dental Practice Act sections. However, I have never been one to take issue with the valuable work of the Ethics Committees of [CDA] unless it was clearly warranted.

In this case I have elected to alter the ad in the subsequent insertions for the Yellow Pages (CX-159).

286. In some cases, members whose advertisements have been challenged have simply given up advertising (CX-1406, CX-570, CX-606, CX-607), in one case, at a substantial cost. Referring to an advertisement which was discontinued ("gentle dentistry in a caring environment"), a component ethics committee stated:

It is the opinion of this Ethics Committee that this advertisement has provided [dentist] with 300 new patients in the last 6 months it is therefore a very big sacrifice for her to eliminate the ad (CX-244).

##### 5. Effect of CDA's Advertising Restrictions on Non-Members

287. Respondent's restrictions on advertising also affect non-members of CDA, for CDA holds members and applicants responsible for advertising published by employers or other businesses such as referral services:

IT IS VERY IMPORTANT TO REMEMBER THAT IN ADVERTISING EACH CDA MEMBER IS RESPONSIBLE FOR ADVERTISEMENTS FROM WHICH HE OR SHE MAY BENEFIT WHETHER OR NOT THE MEMBER'S NAME IS STATED IN THE AD. Accordingly, members need to be aware that if their employers advertise in an unacceptable manner, the member is also responsible since he/she

benefits from the advertisement as well. ("7 Questions Frequently Asked of CDA's Judicial Council" (CX-1358-B))

288. Employers of dentists who are not CDA members have agreed to make changes in their advertising that CDA demands (CX-380-B). In 1993, an associate of a dentist who was applying for employment agreed to change his advertising:

I did have a chance to review the information enclosed and I have no problem making the appropriate modifications. The one advertisement mentioned was not my ad at all (it was placed by Dr. Paul, the general dentist with whom I share space) but I have spoken to him and he has assured me that he will make any and all appropriate modifications to ads that mention or contain my name (CX-124-A). (See also CX-510-B, F).

289. CDA has also contacted referral services to correct advertising which is not consistent with the Code. For example, it instructed a number of its components to contact more than twenty member dentists who participated in the da Vinci Studio referral service because its advertising was inconsistent with the Code (CX-279-96). CDA's objection was that the service had advertised "very affordable, and CDA instructed the components to contact participating members and "remind [them] of their ethical and legal obligations" (CX-279-96).

290. Similarly, in 1987, CDA recommended that acceptance of a dentist into membership be conditioned on correction of advertising by a competitor referral service, 1-800-DENTIST:

[Applicant] stated that she is represented by the 1-800-DENTIST referral service. A review of the advertising submitted for this service indicates several statement [sic] are in violation of the CDA Code of

Ethics and state law. Please make sure [applicant] understands that she is responsible for any advertisement published on her behalf and that the following changes must be made for her to become an unconditional member next year (CX-413-B).

291. CDA also holds members and applicants responsible for what it deems objectionable advertising by hospitals that promote dental services. For example, in 1992, CDA determined that advertising by a hospital promoting dental services was inconsistent with its advertising rules and directed one of its components to meet with the member-dentists whose services were advertised, and instruct them either to have the advertising corrected, or have their names removed from it (CX-354-B). The hospital did correct the advertising, and did so even though the Board of Dental Examiners determined that the advertising did not violate the Dental Practice Act (CX-355).

292. CDA members affiliated with a non-profit charitable organization, "Doctors with a Heart," discontinued use of a press release that informed the public that the organization would provide free care "to children whose parents cannot afford it" on Valentine's Day, after CDA threatened disciplinary action against them. The members discontinued the advertising even though they had been informed by a representative of the California State Board of Dental Examiners that the advertising did not violate state law. The members feared that they could not continue to participate in the program after 1988 and maintain their membership in CDA ("At this time it looks doubtful. There is just so much hassle a person can take from one's peers.") (CX-894, CX-897-D).

293. For other examples of applicants or members who have been challenged by CDA or one of its components on the basis that advertising by an employer or other entity with which the applicant is affiliated violates CDA's Code, see Appendix A to Volume II of complaint counsel's proposed findings.

6. Restrictions on Free Dental Screening of Schoolchildren

294. Through their members, CDA's components have offered school dental screening programs whose results are given to parents (CX-1168, CX-1169).

295. In the early 1980's, CDA became concerned that some members were using screening to promote their own practices by including their names and office addresses on materials that were sent to parents (CX-1118-D). It therefore notified members that screening programs should be arranged through the dental societies and that "even the handing out of business cards (or other printed materials) with the screening dentist's name is considered soliciting" (CX-1161-A-E).

296. In 1984, CDA's Judicial Council passed a resolution stating:

[I]t is the position of the Judicial Council that solicitation of school children on any private or public school ground(s) is deemed not to elevate the esteem of the dental profession (CX-1115-A).

297. CDA based its policy on its interpretation of a state statute prohibiting the solicitation of school children "to subscribe or contribute to the funds of, to become members of, or to work for, any organization not directly under the control of the school authorities" (California Education Code, Article 3, § 51520) (CX-1115-B-C, CX-1166).

298. In May 1993, at the behest of CDA, which learned that certain members who were conducting school screenings were using materials which included their names and addresses, a components president "advised all concerned by letter" that " [w]hether a rubber stamp or written name is used [by a screening dentist] it must not continue. It is a violation of state law and [CDA's] code of ethics" (CX-1343-B).

299. Several dentists have acceded to CDA's wishes regarding dental screenings.

Dr. Beth Hamann

300. Dr. Hamann conducted school dental screenings during the years she practiced in California. At times she gave students a toothbrush personalized with her name and telephone number, as well as a copy of her office newsletter (Tr. 797-98).

301. Her component society informed the schools where she conducted screenings that they were "not an acceptable activity for them to do with private dentists" (Tr. 796). Thereafter, the schools would not permit her to do screenings although the component never showed why the screenings were false or misleading (Tr. 797).

302. Cessation of the school screening meant that Dr. Hamann lost some potential customers (Tr. 798-99) Her component society did not, as it promised the schools, conduct screenings after Dr. Hamann was refused permission to do so (Tr. 797).

Dr. Roger C. Sanger, Dr. James P. Stenger  
and Dr. Ray E. Steward

303. In the 1980's, Drs. Sanger, Stenger, and Steward, CDA members, conducted private pre-school screenings, at their request, outside the auspices of their component; they used either their own forms or their component's form stamped with their name and office address (CX-1149-A).

304. The component to which the dentists belonged objected, in 1983, to the use of forms in their screenings which listed their names and address. The dentists agreed to stop using the component's forms when conducting screenings at private pre-schools (CX-1149-A), but did not agree to stop using their own forms (CX-1149-A).

305. CDA, asked for advice by the component, told it that under a recently adopted policy, solicitation of school children on any private or public school ground is deemed not to elevate the esteem of the dental profession, and recommended that the component counsel the dentists and report the results of the counseling to CDA (CX-1151-A-B).

306. The component then informed the dentists that CDA had advised that the dentists screening form would need to be changed "to assure conformity with [CDA's] code" (CX-1152-A-D). In response, the dentists agreed not to perform screenings on public or private school premises and to participate only in component screenings. However, they did not agree to cease screening at day care centers using their own forms because they believed that day care centers did not fall within the definition of "schools," as they are not regulated by any educational agency of the state. The dentists did say they would modify their day care screening forms to eliminate the word "school" (CX-1153).

307. In July 1985, the component asked CDA whether day care centers are "schools" within the meaning of its resolution concerning school solicitation (CX-1154-A-B).

308. In form letters dated May 5, 1986, the component objected to the dentists' use of their pre-school health education form because such use "may" violate CDA's Code, and informed the dentists that they would have to delete their names from their screening form "to assure conformity" with CDA's Code. The dentists agreed to alter the screening form to conform to CDA's Code (CX-1155-57). In a separate letter, they informed the component that they no longer would conduct screenings in private or public schools other than at the request of the component, and then would use no forms other than the component's form (CX-1158).

Dr. Douglas Grosmark

309. In 1991, Dr. Douglas Grosmark, a CDA member, attended a Halloween carnival (held at an elementary school

after school hours ended) (CX-1133-A) and distributed toothbrushes imprinted with his name and an attached card containing an offer to have a "complimentary video exam & \$25 off your 1st visit" (CX-1132-B). Without Dr. Grosmark's knowledge, principals at two schools distributed the toothbrushes to the children during school hours (CX-1132-A-B, CX-1133-A-B).

310. By letter dated October 21, 1992, the component to which Dr. Grosmark belongs objected to his distribution at schools of any material on which his name was printed because it "may" violate a state law "which was adopted by [CDA] in 1981." The component asked him to confirm that his future visits to any school would comply with state law as interpreted by CDA (CX-1132-A-B).

311. The component was not satisfied with Dr. Grosmark's response and again demanded that he provide assurance that he would not distribute "imprinted" toothbrushes in the future, and informed him that "[a]ny further violations of this nature" would be reported to CDA (CX-1134). By letter dated November 25, 1992, Dr. Grosmark assured the component he would comply ("I do not intend to distribute imprinted toothbrushes to any schools") (CX-1135).

Dr. Rodney L. Mellor

312. Dr. Rodney Mellor, a member of CDA, is another dentist who conducted school screenings outside the auspices of his component and used his own materials in conducting the screenings (CX-1142-A-B).

313. In 1992, the component to which Dr. Mellor belongs objected to his use during school screenings of any materials on which his name was printed because it "may" violate state law (CX-1142-A). The component asked Dr. Mellor to provide assurance that any future visits he made to schools would comply with state law as interpreted by CDA (CX-1142-A).

314. Dr. Mellor acquiesced, and, by letter dated October 22, 1992, promised to comply with "ALL ethical standards" (CX-1143).

Dr. William D. Rawlings and Dr. J. Patrick Davis

315. Drs. Rawlings and Davis, members of CDA, are dentists who distributed their business cards at a pre-school program (CX-1146-A).

316. In 1993, the component to which the dentists belong objected to their distribution at pre-schools of business cards containing their practice's name because it "may" violate CDA's Code and state law (CX-1146-A). The component asked the dentists to provide assurance that they (1) would cease distributing business cards, or any other materials, on which their practice name appears during any school or pre-school programs, and (2) would include on all materials the complete name of their practice as it appears on their fictitious name permit (CX-1146-A-B). Drs. Rawlings, Davis, and Terry T. Yoshikane, by letter dated August 9, 1993, promised to make the required corrections (CX-1147).

317. Other dentists conducting screenings were contacted by CDA or their components with complaints that they did not comply with the Code or state law, but the record does not reveal whether they complied with the advice given them (CPF's 491, 492, 493, 494, 495).

7. Economic Analysis of  
CDA's Advertising Restrictions

318. CDA called, as a witness, Professor Robert Knox, who, complaint counsel stipulated, is an expert in economics and industrial organization (Tr. 1632).

319. Professor Knox has no expertise in, nor has he made any study of, the economic aspects of the dental market or dental advertising (Tr. 1624-25, 1629-32); however, he testified that since dental service markets are controlled by

the same economic phenomena as other businesses, many characteristics of the California dental services market can be analyzed using general economic principles and theory (Tr. 1625).

320. CDA also called Dr. Albert H. Guay, a retired orthodontist, for insight into entry to the dental services market and practice-related aspects of dentistry (Tr. 1223-24, 1226-28). He is the Associate Executive Director of the ADA's Division of Dental Practice which assists members with the business aspects of dental practice (Tr. 1246). Dr. Guay is not an expert in economics (Tr. 1250-52).

321. Dr. Guay testified that, unlike medical patients, dental patients are relatively price sensitive because they must pay for much of their care (Tr. 1243). Since dental treatment is not urgent, patients can "seek the best deal" (Tr. 1244, 1268).

322. Professor Knox testified that CDA's enforcement of its Code of Ethics with respect to advertising has no negative impact on competition in any dental market in California because it cannot erect any barriers to entry (i.e., an advantage which existing firms have over potential entrants (Tr. 1634)) into any dental market in California (Tr. 1633).

323. Professor Knox testified that the only entry barrier into dental service is the acquisition of a license issued by the California State Board of Dental Examiners (Tr. 1634); the need to complete dental school and the acquisition of an office and dental equipment are not barriers to entry (Tr. 1634, 1636). The over supply of dentists which complaint counsel point to as an entry barrier is, he stated, strong evidence of low entry barriers (Tr. 1637). In Professor Knox's view, CDA membership is not a prerequisite to successful practice in any California dental market (Tr. 1639).

324. Professor Knox also testified that scrutiny of dental advertising is pro-competitive because advertising which is

false or misleading has a negative impact on competition (Tr. 1643-45).

325. Professor Knox believes that dental advertising should be critically examined because dental service is an "experience good," i.e., a good that consumers cannot evaluate until after the service has been performed (Tr. 1632-33). Non-price claims, especially those relating to quality, are particularly difficult to verify (Tr. 1646-47), although, he conceded, consumers can make some judgments about quality of care (Tr. 1677-78).

326. Professor Knox concluded that even if CDA occasionally questions member advertisements which are not false or misleading in a material respect:

the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has no impact on competition in any market in the State of California, particularly with respect to price and output (Tr. 1640).

327. Professor Knox rejected the entire State of California as a relevant geographic market on the basis of Mr. Christensen's testimony that a radius encompassing 20 to 30,000 people "would be a market for dental services in California" (Tr. 1642-43). Professor Knox concluded that the dental markets in California are disaggregated, and it would be very difficult for CDA to exercise market power over price and output in all of them (Tr. 1639).

328. On cross examination, the Professor agreed that dental services "could be" a relevant product market (Tr. 1689) and that California "could be" a relevant geographic market. He also agreed that, hypothetically, CDA members can collectively exercise market power "if they act together . . ." (Tr. 1692).

329. Complaint counsel called three witnesses to testify about entry into the dental service market in California.

According to Dr. John S. Miley, opening a dental practice in California today is "an extremely difficult thing to do" (Tr. 331), and Dr. Richard A. Harder, who has established a number of dental practices in California, testified that "it would take about 18 months to actually start generating enough income to match that current month's expenses, and then it would probably require up to about five years to actually recover the capital costs" (Tr. 300).

330. Dr. Curtis P. Hamann, together with his wife, had to borrow approximately \$400,000 to buy two existing dental practices (Tr. 756-60). The practices took about two years to become profitable, and it took about ten years for the Hamanns to pay off all of the associated debt (Tr. 764).

331. Dr. Miley testified that the financial requirements for setting up a dental practice are a big impediment for young dentists today, since they are coming out of school \$50,000-100,000 in debt (Tr. 330). See also CX-1628 ("private practice is most young dentists' first choice of practice setting . . . However, if young dentists can't make a living in that setting, considering the cost of beginning/buying a practice on top of education loans, they are forced to practice in alternative settings").

### III. CONCLUSIONS OF LAW

#### A. CDA's Activities Are In Or Affect Commerce

The Commission has jurisdiction over acts or practices "in or affecting commerce," § 5 FTC Act; 15 U.S.C. §45, providing that their effect on commerce is substantial, McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 241-42 (1980); Hospital Building Co. v. Trustees of Rex Hospital ("Rex Hospital"), 425 U.S. 738, 745-46 (1976). And, as long as the challenged acts or practices create "unreasonable burdens on the free and uninterrupted flow" of commerce, even local activities are subject to FTC jurisdiction, Rex Hospital, 425 U.S. at 738, 745-46.

The potential harm from the challenged conduct, rather than its actual effect on commerce, is the jurisdictional standard:

because the essence of any violation of § 1 of the Sherman Act] is the illegal agreement itself--rather than the overt acts performed in furtherance of it--proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful.

Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330 (1991).

In American Medical Association, 94 F.T.C. at 701 (1979), aff'd as modified, 638 F.2d at 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. at 676 (1982) ("AMA"), the Commission determined that it has jurisdiction over state and local medical societies which restricted advertising by healthcare professionals because these activities, some of which were local in character, had a substantial effect on interstate commerce, 94 F.T.C. at 993-96.

As in AMA, CDA's activities "as a matter of practical economics," Rex Hospital, 425 U.S. at 745-46, place, or have the potential to place, substantial burdens on interstate commerce. These activities include:

The receipt by CDA's members of reimbursements, which cross state lines, for dental services provided by them under health insurance plans which involve the federal government, i.e. Denti-Cal, which paid \$500 million to participating dentists (F. 50).

The purchase or lease of substantial amounts of dental equipment from out-of-state manufacturers (F. 51).

Competition between CDA members and out-of-state dentists for patients, the out-of-state residence of some

CDA members, and the treatment of patients residing outside of California (F. 55, 56).

Restrictions on the contents of advertising by out-of-state suppliers and the placement by CDA of advertisements in national publications (F. 54).

The use of the U.S. Postal Service to enforce CDA's Code of Ethics (F. 57).

The collection and transmission of ADA dues from member dentists to ADA in Chicago (F. 62).

The operations of CDA's for-profit subsidiary, TDIC, which provides professional liability insurance to out-of-state dentists (F. 60).

The operations of CDA's subsidiaries, TDC and TDCIS which provide insurance and other services to CDA members through out of state companies (F. 59).

The attendance of CDA officials and members at out-of-state conferences (F. 58).

#### B. CDA Is a Corporation Under Section 4 of the FTC Act

Section 5 of the FTC Act gives the Commission jurisdiction to prevent unfair methods of competition by "persons, partnerships, or corporations," 15 U.S.C. § 45. Section 4 of the Act defines "corporation" as "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members ...." 15 U.S.C. § 44.

In AMA, the Commission held that its jurisdiction under Section 4 extends to "nonprofit organizations whose

activities engender a pecuniary benefit<sup>2</sup> to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity," AMA, 94 F.T.C. at 701, 983 (1979); see also Michigan State Medical Soc'y, 101 F.T.C. 191, 284 (1983) ("MSMS");

certain organizations ostensibly organized not-for-profit, such as trade associations, may be vehicles through which a profit could be realized for themselves or their members.

In its most recent case dealing with this issue, College Football Ass'n, 5 Trade Reg. Rep. (CCH) ¶ 23,631 ("CFA"), the Commission adopted a "two-pronged" test to determine whether an entity such as CFA is "organized to carry on business ... for profit" and is subject to its jurisdiction.

The Commission's test is derived from Section 501(c) (3) of the Internal Revenue Code which provides an exemption from income taxation for:

[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision or athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual ....

Looking to this provision the Commission stated:

The guidance from federal tax law is clear. Congress has sought to protect and support specific categories of

<sup>2</sup> An expense which otherwise would necessarily be incurred by members, Ohio Christian College, 80 F.T.C. at 815, 848 (1972).

not-for-profit organizations by freeing them from tax liabilities but only so long as (1) no part of their net earnings inures to the benefit of any private shareholder or individual and (2) the activities which generate the income--whether conducted by a feeder organization or by the exempt entity itself--are in furtherance of exempt purposes. The test is two-pronged and requires an adequate nexus between the entity's operations and recognized public purposes. CFA, at 23, 357.

CDA argues that its operations satisfy this test because it is a bona fide nonprofit corporation which is exempt from federal taxation under a similar provision of the Internal Revenue Code, § 501(c)(6). (RB, pp. 4, 16-17).

CDA made the same argument in a motion for summary decision which I denied on September 27, 1994. In that order, I found that CFA did not undermine the relevance of the AMA decision, for the Commission held:

We recognize that a respondent's status as either a § 501(c) (3) or (6) tax-exempt organization does not obviate the relevance of further inquiry into a respondent's operations and goals .... Rulings of the Internal Revenue Service are not binding upon the Commission.

Citing this language and referring to a significant difference between CFA and AMA, i.e., the for-profit nature of AMA's members' businesses, AMA, 94 F.T.C. at 989, I held that:

even though CDA is exempt from federal taxation because it is a "bona fide" nonprofit organization, an additional issue must be addressed: whether its activities which confer a pecuniary benefit to its members are a substantial or incidental part of its total activities.

CDA has not convinced me that my ruling was incorrect; thus, inquiry into the Commission's jurisdiction over CDA must include an analysis of the pecuniary benefits which its activities confer on its members and a determination as to whether those activities represent "a substantial part of [CDA's] overall operation." AMA, 94 F.T.C. at 988 n.13.

In AMA, 94 F.T.C. at 986-91, 741-63, 785-93, 796-801, 918, 921-34, and MSMS, 101 F.T.C. at 283-84, the Commission and the ALJ found that the following activities of the respondents provided economic benefits to their members: lobbying; litigation; public relations and marketing; advice helping members to increase the efficiency, productivity, and profitability of their medical practices; professional placement; peer review; retirement; continuing education; publications; and non-profit subsidiaries and affiliates providing financial, insurance and other services.

Citing Community Blood Bank of Kansas City Area, Inc. v. FTC, 405 F.2d 1011, 1017, (8th Cir. 1969), CDA claims that it is not organized for its or its members' profit and that its profit-making activities are ancillary to its primary purpose, which is to serve public, not private, interests.

CDA serves the public interest through its councils which give advice about dental health and which monitor the ethics of its members (F. 14, 17, 18, 19, 22, 23); CDA has also taken positions on fluoridation and other matters which benefit the general public, but may adversely affect its members (F. 123-25, see also F.126-27).

Nevertheless, and despite the testimony of CDA's President, Dr. Craven (F. 128), the evidence presented by complaint counsel convincingly establishes that, as in AMA,

a substantial part of CDA's activities result in pecuniary benefits to its members:<sup>3</sup>

Lobbying: CDA represents its members with respect to legislative, political and regulatory matters which, but for its intervention, might result in adverse pecuniary consequences (F. 70-73, 76-85). CDA has brought to its members' attention the pecuniary benefits of these activities (F. 74, 77).

Litigation: By challenging, or supporting challenges to, legislation and regulatory activities which are adverse to their interests, CDA has benefited its members' pecuniary interests (F. 84).

Marketing and Public Relations: CDA's marketing and public relations activities benefit its members by fostering a positive image of them (F. 86-88).

Direct Reimbursement: Promoting direct reimbursement benefits CDA's members by avoiding problems engendered by insurer restrictions on payment and procedures (F. 89-91).

Practice Management: CDA has an extensive array of programs which increases its members' efficiency and productivity (F. 92-97).

Peer Review: CDA's peer review system may provide a less costly alternative to traditional methods of resolving patient complaints about dental problems (F. 98-100). See AMA, 94 F.T.C. at 798, 932, 988.

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<sup>3</sup> "Our determination that AMA engages in substantial activities for the economic benefit of its membership is intended in no way to denigrate the many valuable eleemosynary activities in which AMA is engaged [but] such activities do not ... provide immunity from the laws designated to protect the public from anticompetitive practices." AMA, 94 F.T.C. at 987.

Scientific Sessions: CDA's twice-yearly scientific sessions give its members the opportunity, cost free, to satisfy their continuing education requirements (F. 101-06). See: AMA, 94 F.T.C. at 790, 986; MSMS, 101 F.T.C. at 211, 249.

Publications: As in AMA, 94 F.T.C. at 761, 791, 928, 932, 987 and MSMS, 101 F.T.C. at 208-09, 248, 283, CDA's publications provide pecuniary benefits to its members by proving technical and scientific information about dentistry (F. 107-08).

For-Profit Subsidiaries: CDA, through its for-profit subsidiaries, offers its members professional liability insurance (TDIC, F. 109-12), business and personal insurance (TDCIS, F. 113-15), and financial services (TDC, F. 116-18). See AMA, 94 F.T.C. at 757, 761-62, 790-91, 928, 932-33, 987-88; MSMS, 101 F.T.C. at 207-08, 210-11, 248-49, 283.

Membership in ADA and Local Components: Membership in ADA and a local component supplements and extends the benefits obtained from membership in CDA (F. 119-22). See AMA, 94 F.T.C. at 785, 796, 930-31, 988-89; MSMS, 101 F.T.C. at 212, 249.

The enumeration of these benefits establishes that a CDA member taking advantage of all, or even a few of them, would realize a substantial pecuniary benefit.

Statements made by CDA in touting the benefits of these services to its members -- and taking into account some exaggeration -- substantiate that conclusion (F. 67, 68, 74, 76, 77, 84, 88, 97, 99, 105, 108, 109). In contrast, CDA's services to the public accounted for seven percent of its total expenditures. The remainder went to direct member services, association administration and indirect member services (F. 69).

**C. CDA, Its Members, and Its Component Societies Have Conspired to Restrain Members' Advertising**

When an organization is controlled by a group of competitors, antitrust law views the organization as the competitors' agent, and the organization as a combination or conspiracy of its competitor-members. See Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988); National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 682, 692 (1978).

CDA is an association of competing dentists, who, by agreeing to abide by its Code of Ethics, including those provisions regarding advertising (F. 129-33), have conspired among themselves, and with CDA and the component societies which enforce those restrictions (F. 149-67). Compare AMA, in which the Commission stated that "promulgation of a code of ethics implies agreement among the members of an organization to adhere to the norms of conduct set forth in the code" 94 F.T.C. at 998 n.33. As to the component societies, the Commission held, in AMA, that AMA had conspired with its constituent and component medical societies since all of them had articulated, implemented, and enforced ethical guidelines, 94 F.T.C. at 996-1002.

Here, the evidence establishes, as complaint counsel contend, "a 'common design and understanding' on the part of respondent, its component societies, and the individual dentists that comprise the membership of those dental societies to promulgate, disseminate, and enforce ethical restrictions on advertising" (CB, p. 33). See American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946):

Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding . . . the conclusion that a conspiracy is established is justified.

Copperweld Corp. v. Independent Tube Corp., 467 U.S. 752, 767 (1984) ("Copperweld"), relied upon by CDA, does not affect this conclusion. In this case, the Supreme Court held that under certain circumstances, legally separate entities such as a parent and its wholly owned subsidiary, "must be viewed as that of a single entity for purposes of [antitrust analysis]." If so treated, "there is no sudden joining of economic resources that had previously served different interests, and there is no justification for [antitrust] scrutiny." *Id.* at 771.

The Supreme Court in Copperweld was referring to a corporation and its wholly-owned subsidiaries which, because the law views them as an entity, are incapable of conspiring.

CDA, its component societies and its members are, in contrast, legally separate and independent entities which are engaged in activities whose purpose is to restrict truthful advertising, and they have therefore conspired to do so. See Massachusetts Board of Registration in Optometry, 110 F.T.C. 549, 610 (1988) ("Mass Board"). See also Northern Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 215 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 880 (1987).

D. The Agreement to Restrict Advertising  
Violates Section 5 of the FTC Act

1. The Restrictions are Inherently Suspect

In Mass Board, the Commission found that the Board of Registration in Optometry had promulgated regulations restricting advertising by optometrists.

Citing recent Supreme Court decisions rejecting a per se analysis of conduct that is essential to a legitimate purpose,

<sup>4</sup> NCAA v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85, 1012 (1984) ("NCAA"); Broadcast Music, Inc. v. CBS, 441 U.S. 1, 10, 23-24 (1979).

and recognizing that the Supreme Court has been reluctant to condemn rules adopted by professional associations as presumptively unreasonable, Mass Board, 110 F.T.C. at 602, 606, the Commission adopted a method of analysis which "is more useful than the traditional use of the per se or rule of reason labels but which is consistent with the recent cases that apply a traditional analysis." Mass Board, 110 F.T.C. at 603-04.

This structure is readily described as a series of questions to be answered in turn. First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and reduce output"? . . . If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a second question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition . . . Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry -- a third inquiry -- is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry -- there are no likely benefits to offset the threat to competition.

Mass Board, 110 F.T.C. at 604 (emphasis in original).

Since "[a]dvertising plays an indispensable role in the allocation of resources in a free enterprise system" Bates v. State Board of Arizona, 433 U.S. 350, 364 (1977), restraints on truthful advertising "are inherently likely to produce

anticompetitive effects," Mass Board, 110 F.T.C. at 605, AMA, 94 F.T.C. at 1005, and are illegal absent a plausible justification.

— CDA has a legitimate interest in fostering truthful, informative advertising by its members and has, since 1985, announced an advertising policy which would restrict only those advertisements which are false or misleading in a material respect (F. 246) or which are false or misleading in their entirety (F. 247).

However, CDA has not followed its policy, and has, instead, created confusion among its members as to the meaning of "material respect" (F. 217-221) and what is or is not acceptable in their advertising (F. 250-58).

This confusion is caused by uncertainty about the role of CDA's Judicial Council and the component societies. The result is the lack of a consistent procedure to inform members about changes in CDA's advertising rules (F. 259-64). Thus, CDA has banned not only those advertisements which violate its announced policy but also advertising which is lawful and informative.

CDA's actions are consistent with a mindset which believes that advertising by dentists is demeaning (F. 135-40), a view which the Supreme Court has long condemned. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976):

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.

See also AMA, 94 F.T.C. at 1026:

The equivocal language of [AMA's] 1976 Statement and its often antagonistic tone toward advertising and solicitation . . . has sent a clear signal to the profession.

As a consequence, CDA has successfully (F. 275-93) withheld from the public information about prices (F. 168-73), discounts (F. 174-82), quality (F. 183-93), superiority of service (F. 194-204), guarantees (F. 205-07), and the use of procedures to allay patient anxiety (F. 208-16).

CDA has also, regardless of their truth, expressed displeasure with claims that are allegedly insulting, offensive to peers, vague or ambiguous, subjective, or do not elevate the esteem of the profession. CDA has also banned advertising listing more than one location or which claims a religious or ethnic affiliation (F. 222). All of these restrictions are inherently suspect. Mass Board, 110 F.T.C. at 606 (restrictions on price advertising are "aimed at affecting the market price"); Mass Board, 110 F.T.C. at 607: "The fact that [a] ban deprives consumers of information concerning service rather than price in no way diminishes the inherently anticompetitive nature of the restraints."

## 2. The Restrictions Are Not Justified

CDA has not met its burden of establishing that the inherently suspect advertising restrictions which it has imposed "are capable of creating or enhancing competition," Mass Board, 110 F.T.C. at 604.

The reason that CDA adopted its advertising policy may have been, in part, to protect consumers from false or deceptive advertising, but its policy also reflects, in its inception and its implementation, a hostility toward advertising by its members even if it is truthful and nondeceptive.

As a voluntary regulator of its members' advertising, CDA should have enforced its policy so that its restraints were "narrowly directed toward false or deceptive advertising," AMA, 94 F.T.C. at 1009. It has not done so. Instead, it has failed to apply "general principles of deceptive advertising law in a . . . context taking into account the substantial body

of law construing Section 5 of the FTC Act," AMA, 94 F.T.C. at 1030, and has unjustifiably banned whole categories of advertisements which are not false or misleading in a material respect.

Thus, CDA has banned price advertisements which are inexact (F. 168) or which fail to reveal all price information even though the Supreme Court in Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977), recognized that there was no reason for a ban on the phrase "very reasonable fees," because "advertising will permit the comparison of rates among competitors, thus revealing if the rates are reasonable." *Id.* at 382 (F. 169). See also AMA, 94 F.T.C. at 1030: "it is especially important that price advertising remain as unfettered as possible." CDA has done the opposite: it has adopted rules for discount advertising which effectively outlaw it by imposing requirements which cannot be met (F. 179-80).

CDA's fears of the deceptive potential of non-price claims has also resulted in unnecessary disputes about and bans on advertising claims of quality or superiority of service on the grounds that they are subjective, unverifiable and incapable of measurement (F. 226-29). See AMA, 94 F.T.C. at 1023:

Respondent's counsel defended the ban on self-laudatory and superiority claims on the grounds that such claims convey no useful information and can only be misleading, since they are not susceptible to any kind of measurement. This characterization of claims on the basis of their utility to consumers or ease of measurement illustrates the potential scope of respondent's ban on "solicitation."

CDA argues that its members have leeway with respect to advertising claims, but the evidence belies its assertion. For example, CDA's requirements for discount claims effectively ban advertising making this claim without regard to their truth and the same is true with respect to other claims: price

(F. 170); quality (F. 183, 186); superiority (F. 198); guarantees (F. 205); and, miscellaneous claims (F. 222).

CDA cannot justify its advertising restrictions by pointing to state law (F. 230) as a model for determining what is or is not lawful:

A state, acting on behalf of the interest of its citizens, is undoubtedly entitled to greater latitude in preventing deceptions and unfair practices than a professional association representing the interests of horizontal competitors, AMA, 94 F.T.C. at 1010 n.55.

In any event, CDA has expressed displeasure about members' advertisements which would satisfy state law (F. 234-43).

Finally, CDA's fears that dentists involved in school screenings (F. 295-98), may pressure children or parents into using their services is not supported by any record evidence and its actions have denied schoolchildren the benefits of dental screening.

### 3. CDA's Members Do Not Have Market Power

Relying on testimony by Dr. Knox, CDA's economic expert, complaint counsel state that "respondent's members collectively have, and can exercise, market power in the dental service market in California" (CB, p. 52).

CDA, its components and its members have illegally conspired to prevent members, and potential members, from using truthful, nondeceptive advertising, and this conspiracy has injured those consumers who rely on advertising to choose dentists.

This conclusion, which is well-documented, does not, however, establish that CDA's members have "market power" -- i.e., the "ability to raise prices above those that

would prevail in a competitive market," United States v. Brown University, 5 F.3d 658, 668 (3d. Cir. 1993).

Complaint counsel's argument is based on Dr. Knox's agreement on cross-examination that California could be a relevant geographic market, and that dental services could be a relevant product market (F. 328). However, Dr. Knox did not testify that these markets existed.

Complaint counsel also obtained a concession, based on a hypothetical, that CDA members could collectively exercise market power if they acted together (F. 328) but Dr. Knox did not testify that CDA, in fact, could exercise market power and complaint counsel have not produced any convincing evidence that CDA members have acted or could act together to raise prices or reduce output, nor have they established in what geographic market or markets the alleged market power could be exercised.

The problems experienced by dentists in opening a practice in California are real (F. 329-31) but they do not pose an insurmountable obstacle to entry. Since that is the case, CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local. See Langefeld and Morris, Analyzing Agreements Among Corporations: What Does The Future Hold? 36 Antitrust Bull. 651, 677 (1991):

[e]ntry by independent firms prevents voluntary associations from raising prices above the competitive level that would exist without the association.<sup>5</sup>

However, the failure to establish the conditions for satisfaction of a Rule of Reason analysis<sup>6</sup> is not fatal. See Mass Board, 110 F.T.C. at 602 n.8:

<sup>5</sup> Messrs. Langefeld and Morris were, respectively, the Director and Assistant to the Director for Antitrust in the FTC's Bureau of Economics.

The Court [in FTC v. Indiana Dentists, 476 U.S. 447 (1986)] rejected the dentists' argument that the Commission erred in not making elaborate market power determinations. . . .

#### IV. SUMMARY

- A. The Commission has jurisdiction over the acts and practices of CDA which are challenged in the Complaint.
- B. CDA, along with its components and members, has engaged in a combination or conspiracy to restrain trade by unreasonably preventing its members or potential members from using truthful, nondeceptive advertising to the injury of its members and to consumers of dental services.
- C. CDA's acts and practices unreasonably restrain competition and constitute an unfair method of competition in violation of Section 5 of the FTC Act.

#### V. ORDER

In view of CDA's violation of Section 5 of the FTC Act, the order proposed by complaint counsel is, with one exception, justified.

Part I defines terms used in the order. The only unusual definition is that of "restricting," which is defined as "taking any action against a dentist based on the advertising practices of the dentist's employer." There is evidence that this has occurred and the prohibition is appropriate (F. 210, 293).

<sup>6</sup> "Substantial market power is an essential ingredient of every antitrust case under the Rule of Reason," Sanjuan v. The American Board of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994).

Part II of the order requires CDA to cease and desist from engaging in practices which the complaint challenges, including its restraints on advertisement of price, services, facilities, and equipment.

Part III A of the order requires CDA to remove from its Code of Ethics provisions that are inconsistent with the order. Part III A also requires CDA to remove from its Code of Ethics and Bylaws any other policy statements or guidelines that are inconsistent with Part II of the order.

Part III B of the order requires respondent to ban any component that continues to engage in practices prohibited by Part II of the order.

Part IV A of the order requires CDA to inform its members of the order's provisions.

Part IV D of the order requires CDA, for five years, to mail a copy of the order, complaint and announcement to each new member.

Parts IV B and IV C of the order require CDA to send notices to and reconsider the membership status of certain members who have been disciplined by CDA in the enumerated ways.

Parts V A and V B of the order require CDA, every six months for three years, to maintain a written record for each time it or its component societies take action against a dentist because of his or her advertising practices.

Part VI A of the order requires CDA to establish and maintain, for five years, a program which will ensure its compliance with the order.

Parts VI B-E are standard provisions common to other Commission orders.

CDA objects to certain provisions of the order. It claims that since it has never restricted advertising because it is undignified or unprofessional, Part II of the order which requires it, *inter alia*, not to restrain "representations not contributing to the esteem of the public or the profession" should be stricken. This part of the order is appropriate because CDA and its components have expressed concerns about such advertising (F. 222).

CDA also opposes the requirement in Part IV C that would require it to send notice to, and reconsider the membership applications of, members who were dropped by CDA over the last ten years for non-payment of dues. I agree that this provision has no apparent connection with CDA's illegal acts and it will be stricken.

Finally, CDA argues that Part III of the order is vague. This part requires CDA to remove from its Code and Bylaws any provision which is inconsistent with provisions of Part II. There may be differences of opinion by CDA and Commission staff about provisions which are inconsistent but they can be resolved without resorting to further litigation.

## UNITED STATES COURT OF APPEALS

## FOR THE NINTH CIRCUIT

CALIFORNIA DENTAL ASSOCIATION,	)
	)
Petitioner,	) No. 96-70409
	)
v.	) FTC Docket No. 9259
	)
FEDERAL TRADE COMMISSION,	) ORDER
	)
Respondent.	)
	)

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Before: CHOY and HALL, Circuit Judges, and REAL, District Judge.

Judges Choy and Hall have voted to deny petitioner's petition for rehearing. Judge Real would grant the petition. Judges Choy and Hall have recommended rejection of the suggestion for rehearing en banc and Judge Real would accept the suggestion.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

**FILED**

JAN 28 1998

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

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Hon. Manuel L. Real, United States District Judge for the Central District of California, sitting by designation.

(3)  
JUN 1 1998

No. 97-1625

OFFICE OF THE CLERK

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# In the Supreme Court of the United States

OCTOBER TERM, 1997

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CALIFORNIA DENTAL ASSOCIATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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BRIEF FOR THE FEDERAL TRADE COMMISSION  
IN OPPOSITION

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28 pp

**QUESTIONS PRESENTED**

1. Whether the court of appeals correctly sustained the Federal Trade Commission's determination that petitioner is subject to the Commission's jurisdiction because it is a trade association "organized to carry on business for \* \* \* [the] profit \* \* \* of its members" within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.
2. Whether the court of appeals and the Commission conducted a sufficient analysis to determine, under the rule of reason, that petitioner's restrictions on its members' advertising of prices, discounts, and quality claims violated Section 5 of the Act, 15 U.S.C. 45.

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---

**BRIEF FOR THE FEDERAL TRADE COMMISSION  
IN OPPOSITION**

---

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 128 F.3d 720. The opinion and order of the Federal Trade Commission (Pet. App. 27a-158a) and the initial decision of the administrative law judge (Pet. App. 159a-265a) are not yet officially reported.

**JURISDICTION**

The judgment of the court of appeals was entered on October 1, 1997. A petition for rehearing was denied on January 28, 1998. Pet. App. 266a. The petition for a writ of certiorari was filed on April 3, 1998. The ju-

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioner California Dental Association is a nonprofit trade association. Pet. App. 8a. Membership is not necessary to obtain a state dental license, but 75% of the State's practicing dentists have joined the association. *Ibid.* Petitioner provides its members with a variety of services, including "lobbying, marketing and public relations, seminars on practice management, assistance in compliance with OSHA and disability requirements, continuing education, placement services, and administrative procedures for handling patient complaints." *Ibid.* For-profit subsidiaries offer members practice-related services such as liability and other insurance plans and financing for the purchase of office equipment. *Id.* at 8a-9a.

To establish and maintain membership in petitioner, a dentist must agree to abide by a Code of Ethics adopted by petitioner's House of Delegates and interpreted and enforced by its Judicial Council. Pet. App. 9a, 46a-47a. Petitioner and its local affiliates monitor dentists' compliance with the Code. Applicants who do not comply may be denied membership in the Association, and members found to have violated the Code may be censured, suspended or expelled. *Id.* at 11a-12a, 47a; see *id.* at 56a n.6, 190a, 193a-198a, 232a-233a.

Section 10 of petitioner's Code prohibits advertising that is "false or misleading in any material respect." Pet. App. 9a. Official advisory opinions have interpreted Section 10 to prohibit any statement that "relates to fees for specific types of services without fully and specifically disclosing all variables and

other relevant factors," and to require that any advertisement using "words of comparison or relativity," such as "low fees," to describe the cost of dental services "must be based on verifiable data substantiating the comparison or statement of relativity." *Id.* at 9a-10a, 64a. Another advisory opinion states that "claims as to the quality of services are not susceptible to measurement or verification," and are therefore "likely to be false or misleading." *Id.* at 10a, 74a-75a. Supplemental "advertising guidelines" further specify that any advertisement of a discount must disclose the nondiscounted fee for the same service; the discounted fee or the percentage discount offered for each "specific service"; the length of time the discount will be offered; "[v]erifiable fees"; and what specific groups qualify for the discount, or any other relevant terms, conditions or restrictions. *Id.* at 11a, 64a-65a.

Petitioner and its affiliates have applied these standards to prohibit dentists from advertising "low," "reasonable," or "affordable" fees, and to preclude across-the-board discount advertisements such as "10% senior citizen discount," "20% off new patients with this ad," and "25% discount for new patients on exam x-ray & cleaning/ 1 coupon per patient/ offer expires 1-30-94." Pet. App. 65a-67a, 198a-199a; see also *id.* at 77a, 200a-202a. They have further prohibited quality claims such as "quality dentistry," "dedicated to maintaining the highest quality of endodontic care," "improved results with the latest techniques," and "latest in cosmetic dentistry." *Id.* at 75a, 202a-206a. Petitioner at one time disapproved advertising of "gentle" care, and its local affiliates thereafter continued to proscribe similar advertising. *Id.* at 76a, 211a-212a. Petitioner has also proscribed claims

implying superior quality, such as “state of the art” care, “highest standards in sterilization,” or “all of our handpieces (drills) are individually autoclaved for each and every patient”; claims of punctual service; and advertised guarantees, such as “we guarantee all dental work for 1 year” and “crowns and bridges that last.” *Id.* at 75a-76a, 204a, 206a-210a.

2. a. Respondent Federal Trade Commission (FTC) issued an administrative complaint charging that petitioner’s ethical rules, as interpreted and enforced, had restrained competition among dentists in California in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. After extensive discovery and a two-week hearing (see Pet. App. 160a), an Administrative Law Judge (ALJ) concluded that petitioner had violated the Act. *Id.* at 159a-265a.

The ALJ concluded that petitioner was a “corporation” subject to the FTC’s jurisdiction under Sections 4 and 5 of the Act, 15 U.S.C. 44-45, because “a substantial part of [its] activities result in pecuniary benefits to its members.” Pet. App. 253a; see *id.* at 249a-254a. On the merits, the ALJ determined, on the basis of extensive factual findings (see *id.* at 161a-247a), that petitioner’s ethics Code, as actually enforced, “unjustifiably banned whole categories of advertisements which are not false or misleading in a material respect,” and that by enforcing the Code petitioner had “successfully withheld from the public information about prices, discounts, quality, superiority of service, guarantees, and the use of procedures to allay patient anxiety.” *Id.* at 259a-260a (record citations omitted). In rejecting petitioner’s proffered pro-competitive justification for its advertising restrictions, the ALJ found that the restrictions arose from and reflected, at least in part, an “aversion

to competition.” *Id.* at 191a-193a. The ALJ was not convinced that petitioner enjoyed “market power,” but he concluded that petitioner had violated the Act because it had “illegally conspired to prevent members, and potential members, from using truthful, nondeceptive advertising” and the conspiracy had “injured those consumers who rely on advertising to choose dentists.” *Id.* at 261a-263a.

b. On plenary review of the ALJ’s initial decision (see 16 C.F.R. 3.54(a)-(b)), the Commission agreed that petitioner was subject to its jurisdiction as a corporation “organized to carry on business for its own profit or that of its members” within the meaning of 15 U.S.C. 44. Pet. App. 47a-52a. Noting that it had previously rejected the argument that the term “profit” in this context could properly be limited to “direct gains distributed to \* \* \* members,” the Commission held that it had jurisdiction in this case because a substantial portion of petitioner’s activities consist of lobbying, practice-management, marketing, public relations, and other business-related services that confer “pecuniary benefits” on its members. *Id.* at 49a, 51a-52a.

On the merits, the Commission first determined that petitioner’s restrictions on price advertising, as actually enforced, “effectively precluded advertising that characterized a dentist’s fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts,” without any real regard for whether any particular advertisement was inaccurate or misleading. Pet. App. 65a-66a. Reasoning that an agreement among competitors to “suppress[] broad categories of truthful and nondeceptive price advertising” would “effectively suspend a significant form of price competition” (*id.* at 69a), the Commission

concluded that petitioner's "effective prohibition on [even] truthful and nondeceptive advertising of low fees and across-the-board discounts constitute[d] a naked attempt to eliminate price competition and must be judged unlawful per se." *Id.* at 67a; see *id.* at 60a-63a, 67a-73a.

In addition to its "per se" discussion, the Commission also undertook a "rule of reason" analysis. That analysis covered not only petitioner's restrictions on price advertising but also its restrictions on non-price advertising, such as the preclusion of "all quality claims" and restrictions on "claims of superiority," the issuance of "guarantees," and the advertising of "gentle" care. Pet. App. 73a-92a; see *id.* at 75a-76a. In addition to general observations concerning the effects of restrictions on truthful price and non-price advertising, the Commission cited "substantial evidence" in this case "that the restrictions imposed by [petitioner] prevented the dissemination of information important to consumers and the advertising of aspects of a dental practice that form a significant basis of competition among California's dentists." *Id.* at 76a; see *id.* at 76a-78a. Thus, although it did not "quantify[] the increase in price or reduction in output occasioned by these restraints," the Commission found their "anticompetitive nature" to be "plain." *Id.* at 78a.

The Commission rejected the ALJ's conclusion that petitioner lacked sufficient "market power" for its advertising restrictions to affect California consumers, agreeing instead with his finding that those restrictions had "injured those consumers who rely on advertising to choose dentists." Pet. App. 78a-79a. On the record before it, the Commission had "little doubt" that petitioner had "the ability to police,

and entice its members to adhere to, the restrictions on advertising." *Id.* at 80a. In addition, the Commission concluded that petitioner had "the necessary power to cause harm to consumers" (*ibid.*) by inducing its members to withhold information, because "the services offered by licensed dentists have few close substitutes" (*id.* at 82a); "the market for such services is a local one" (*ibid.*); petitioner's members command "more than a substantial share of these markets" (*ibid.*); and, contrary to the ALJ's understanding, there are "significant barriers to entry" into those markets (*id.* at 82a-84a).

The Commission also rejected petitioner's contention that its restrictions were either harmless or pro-competitive. Pet. App. 84a-89a. Although the Commission agreed that the prevention of "false and misleading" advertising is a "laudable purpose," in its view "the record [would] not support the claim that [petitioner's] actions [were] limited to advancing that goal." *Id.* at 84a. It found, rather, that petitioner's "broad categorical prohibitions" (*id.* at 87a) were enforced "without any enquiry as to how [prohibited terms, claims or promises] \* \* \* might be construed by consumers and whether, as construed, they are true of the particular practitioner making the claim" (*id.* at 86a), and without "evidence of significant abuse \* \* \* that might provide support for a prophylactic ban" (*id.* at 85a). The Commission perceived "no convincing argument, let alone evidence" in the record to show "that consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising [petitioner] restricts," or to support the conclusion that all such advertising is "categorically false, deceptive, or unfair." *Id.* at 89a.

Having found that petitioner's categorical advertising restrictions were likely to have real anticompetitive effects and that they were unsupported by valid efficiency or business justifications, the Commission held that their imposition violated Section 5 of the Act. Pet. App. 90a-91a.<sup>1</sup> The Commission therefore ordered petitioner to cease and desist from imposing such restrictions. *Id.* at 27a-42a. The order expressly provides, however, that petitioner may "adopt[] \* \* \* and enforc[e] reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act." *Id.* at 30a. Thus, the Commission explained, petitioner remains "free to regulate false and misleading forms of marketing and advertising by its members," but it may not impose "broad categorical bans on truthful and nondeceptive advertising of the price, quality, or availability of dental services." *Id.* at 43a.

Commissioner Starek concurred in the Commission's judgment and order and in most of its conclusions. Pet. App. 147a. He would, however, have employed a somewhat different analytical framework from that reflected in the majority opinion. *Id.* at 148a-158a.

Commissioner Azcuenaga dissented. Pet. App. 108a-147a. She specifically concurred in the major-

<sup>1</sup> The Commission also rejected petitioner's arguments that petitioner could not or did not enter into any potentially unlawful agreement with its members or local affiliates (Pet. App. 52a-60a) and that its restrictions were permissible because state law imposed similar ones (*id.* at 92a-93a). Petitioner does not renew those claims in this Court.

ity's jurisdictional holding, and she agreed with "much in the majority's opinion," including that a trade association's "categorical and complete ban on price advertising" would be unlawful. *Id.* at 108a. She concluded, however, that the record evidence in this case "f[ell] short of establishing liability." *Ibid.* In particular, she "question[ed]" whether sufficient evidence supported the Commission's finding that petitioner had enforced its rules "in such a way as to limit truthful advertising" (*id.* at 109a, 112a-136a), and she did not believe the evidence was sufficient to support the Commission's finding of market power, which she considered "essential to a finding of liability under the rule of reason" (*id.* at 110a, 136a-147a).

3. The court of appeals affirmed the Commission's decision and enforced its order. Pet. App. 1a, 8a-24a. The court agreed with the Commission and other courts that Congress "did not intend to provide a blanket exclusion for nonprofit corporations" under the Act, and it approved the Commission's approach of "looking at whether the organization provides tangible, pecuniary benefits to its members" in order to determine whether it is a "corporation" subject to the Commission's jurisdiction. *Id.* at 15a-16a. Under that standard, the court was "confident that the facts of this case support the FTC's jurisdiction." *Ibid.*

On the merits, the court rejected the Commission's holding that petitioner's price-advertising restrictions were *per se* illegal. Pet. App. 17a-18a. It agreed, however, that those restrictions "amounted in practice to a fairly 'naked' restraint on price competition itself" (*id.* at 18a), and it found "no evidence" in the record to support petitioner's asserted justifications of preventing false advertisements and requiring disclosure of additional facts important to consumers

(*id.* at 19a). The court accordingly concluded that the Commission had properly held petitioner's price-advertising restrictions to be unlawful without engaging in an "elaborate industry analysis." *Id.* at 18a-19a. Similarly, the court held (*id.* at 19a-20a) that petitioner's restrictions on non-price advertising, which "prevent[ed] dentists from fully describing the package of services they offer, and thus limit[ed] their ability to compete," constituted a "naked restraint on output." The Commission's analysis was therefore adequate to hold the restrictions unlawful, given "the nature of the restraint and the circumstances in which it [was] used." *Id.* at 20a; see *id.* at 24a.

The court rejected petitioner's contention that the record was insufficient to support the Commission's rule-of-reason analysis. Pet. App. 20a-24a. In particular, the court held that there was substantial evidence to support the Commission's conclusion that petitioner's restrictions were applied, in practice, to restrict advertising that was "in fact true and nondeceptive" (*id.* at 21a-22a), or "without any particular consideration of whether it was true or false" (*id.* at 23a). The court also held that the Commission had adequately addressed the issue of market power, holding that "[g]iven the facially anticompetitive nature of both the price and nonprice advertising restrictions, the evidence of [petitioner's] large market share and influence justifie[d] finding a violation" without more detailed analysis. *Id.* at 24a. The court accordingly affirmed the Commission's opinion and enforced its order to cease and desist from restricting "truthful and non-deceptive advertisements." *Ibid.*

Judge Real dissented. Pet. App. 25a-26a. In his view, petitioner had "nothing to do with competition in the dental profession," and was therefore not

subject to the Commission's jurisdiction. *Id.* at 25a. Even on the assumption that the Commission had jurisdiction, he would have held that petitioner did not intend to restrain competition, and that its advertising restrictions could not properly be held unlawful without more searching economic analysis.

#### ARGUMENT

1. Petitioner argues (Pet. 9-16) that as a "non-profit" trade association it is not a "corporation" subject to the FTC's jurisdiction under Sections 4 and 5 of the Federal Trade Commission Act, 15 U.S.C. 44-45. That is not correct.

The definition of "corporation" in Section 4 includes both entities with and those without "shares of capital or capital stock," and it expressly applies to any non-stock "association," other than a partnership, that is "organized to carry on business" for the "profit" of its "members." 15 U.S.C. 44. That language suggests that Congress intended the definition to reach non-stock associations, such as petitioner, that are composed of members engaged in commerce who have joined together in significant part to advance their commercial or professional economic interests. Such a construction is supported by a common-sense understanding of the purposes of the Act, which surely extend to regulating the activities of commercial associations, even if the direct economic benefits of those activities are realized derivatively by association members through an increase in their own business or profits. And it is confirmed by the Act's legislative history, which shows that the definition of "corporation" was expanded to include an association without capital stock organized for the profit "of its members" after the Commissioner of the

Bureau of Corporations, predecessor to the FTC, complained to the author of the Senate bill that the original language could prevent the proposed Commission from regulating trade associations organized as nonprofit corporations. See *Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1017-1018 (8th Cir. 1969).<sup>2</sup>

The court of appeals in this case therefore properly agreed with the Commission, and with every court of appeals that has considered the matter, that the Act does not “provide a blanket exclusion for nonprofit corporations.” Pet. App. 16a; see *id.* at 48a-49a; *American Medical Ass’n v. FTC*, 638 F.2d 443, 448 (2d Cir. 1980), aff’d by an equally divided Court, 455 U.S. 676 (1982)<sup>3</sup>; *FTC v. National Comm’n on Egg Nutrition*, 517 F.2d 485, 487-488 (7th Cir. 1975), cert. denied, 426 U.S. 919 (1976); *Community Blood Bank*, 405 F.2d

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<sup>2</sup> Petitioner’s reliance (Pet. 14-15) on the failure of a 1977 proposal to amend the Act—always “a particularly dangerous ground on which to rest an interpretation of a prior statute,” *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994)—is particularly unavailing here, because the proposed amendment would not simply have codified the Commission’s interpretation of the present statutory language. It would, instead, have eliminated any distinction between regular business corporations and nonprofit entities of any kind, including those organized for purely charitable purposes. See also, e.g., *FTC v. Dean Foods Co.*, 384 U.S. 597, 608-611 (1966) (rejecting a similar argument based on congressional inaction).

<sup>3</sup> We note that *American Medical Association* presented before this Court not only the jurisdictional question, but also a question concerning the propriety of the Commission’s entry of a prospective cease-and-desist order in light of ethical-rule changes adopted by the AMA after the filing of the administrative complaint. See 80-1690 Gov’t Br. I, 46-59.

at 1017; see also *National Harness Mfrs. Ass’n v. FTC*, 268 F. 705, 708-709, 712 (6th Cir. 1920) (unincorporated trade association). The court further sustained the Commission’s approach of distinguishing between truly charitable entities and those that are subject to its jurisdiction under Sections 4 and 5 by determining whether a substantial portion of the organization’s activities are ones that confer pecuniary benefits on members that are themselves commercial or professional enterprises. Pet. App. 16a, 48a-50a; compare *In re College Football Ass’n*, 117 F.T.C. 971 (1994) (finding no jurisdiction over an entity whose own activities bore a substantial nexus to a charitable purpose and whose proceeds were distributed exclusively to members that were themselves nonprofit entities). Applying that standard, the court of appeals found itself “confident that the facts of this case support the FTC’s jurisdiction.” Pet. App. 16a.<sup>4</sup>

That result does not, as petitioner argues (Pet. 9-13, 16), conflict with the decision in *Community Blood Bank*. Although the Eighth Circuit in that case rejected the broad argument that the Commission could reach any organization that receives “fees,

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<sup>4</sup> Petitioner does not dispute the Commission’s factual determination, sustained by the court of appeals, that a substantial portion of petitioner’s activities are devoted to furthering its members’ business interests through, for example, lobbying, litigation, public relations, and numerous forms of assistance with the business aspects of their dental practices. See Pet. App. 8a, 51a-52a. Indeed, by one of petitioner’s own accountings, 65% of petitioner’s resources funded “[d]irect [m]ember [s]ervices,” while only 7% were devoted to “[s]ervices to the [p]ublic.” *Id.* at 52a. In 1985, petitioner estimated that its marketing program had resulted in “nearly \$6,000 in additional revenues [per member dentist], or a 20-to-1 return on investment.” *Id.* at 180a.

prices, or dues" and is not "prohibited by its charter from devoting any excess of income over expenditures \* \* \* for its own self-perpetuation or expansion," 405 F.2d at 1016 (internal quotation marks and emphasis omitted), it explicitly recognized that

Congress did not intend to provide a blanket exclusion of all nonprofit corporations for it was also aware that corporations, ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members.

*Id.* at 1017. It therefore concluded that jurisdiction under the Act must be "determined on an ad hoc basis" by evaluating, not the form of an association's incorporation, but whether it was "in law and in fact [a] charitable organization[]." *Id.* at 1018-1019.

In holding that the blood bank and hospital association parties before it were "true nonprofit charitable corporations" (405 F.2d at 1018) for purposes of Section 4, the Eighth Circuit focused on their purposes, activities, and affiliation with other non-profit organizations. *Id.* at 1013-1014, 1020 & n.16, 1021-1022. Moreover, the court explicitly distinguished those entities from trade or business associations "designed to \* \* \* bring together firms having common business concerns," which it characterized as "engaged in business for a pecuniary profit" on behalf of themselves or their members. *Id.* at 1019; see *id.* at 1017; cf. *FTC v. Freeman Hospital*, 69 F.3d 260, 266 (8th Cir. 1995) (quoting as *Community Blood Bank*'s holding its statement that the Act excludes from jurisdiction "nonprofit corporations \* \* \* organized for and actually engaged in business for *only charitable purposes*" (emphasis added)). That distinction is

consistent with the decisions below in this case, and with the long line of cases, before and after *Community Blood Bank*, in which this Court and others have entertained cases brought under the Act against trade or professional associations.<sup>5</sup> While the question whether a particular organization is "truly charitable" (Pet. App. 16a) for these purposes, or otherwise does not qualify as a corporation within the meaning of Section 4, may sometimes be a close one, that is true of many such factual determinations, and in any event the question is not close here. The matter accordingly does not warrant review in this case.

2. Petitioner contends (Pet. 16-29) that the court of appeals erred by applying an "abbreviated rule of reason" analysis in a manner that conflicts with decisions of this Court and other courts of appeals. To

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<sup>5</sup> See, e.g., Pet. App. 16a ("we agree with the Eighth Circuit that truly charitable organizations should be exempt from the FTC's reach"), 48a ("the test we apply was first articulated in *Community Blood Bank*"); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941); *National Comm'n on Egg Nutrition*, 517 F.2d at 488; *National Harness Mfrs. Ass'n v. FTC*, 268 F. at 708-709. By contrast, courts of appeals have expressly addressed the jurisdictional issue petitioner seeks to raise in only a handful of decisions since the Act was passed in 1914. See Pet. App. 14a-16a; *American Medical Ass'n*, *supra*; *National Comm'n on Egg Nutrition*, *supra*; *Community Blood Bank*, *supra*; see also *National Harness Mfrs. Ass'n*, *supra* (unincorporated trade association); cf. *FTC v. Ernstthal*, 607 F.2d 488, 491 (D.C. Cir. 1979) (issue of FTC's jurisdiction is a factual one not suitable for resolution in subpoena enforcement proceeding).

the contrary, the court enforced the Commission's order in this case because it concluded that the Commission's detailed factfinding provided substantial support for a legal analysis that was adequate under the circumstances of the case. See Pet. App. 18a, 20a-24a. That context-sensitive approach to antitrust analysis is fully consistent with applicable law.

We note, at the outset, that much of petitioner's argument rests on the premise that its advertising restrictions have been "found to have no anticompetitive effects." Pet. 16; see also, *e.g.*, Pet. i. That premise is incorrect. Many of the "findings" by the ALJ that petitioner quotes or cites are merely summaries of the testimony given by petitioner's expert. Compare Pet. 2, 6-7 with Pet. App. 245a-246a. Moreover, while the ALJ concluded that petitioner did not have "market power" (Pet. App. 262a), he also declared it "well-documented" that petitioner had engaged in an illegal conspiracy that "injured those consumers who rely on advertising to choose dentists" (*id.* at 261a). In any event, whatever the ALJ's findings, the Act invests only the Commission itself with the authority to find facts or reach legal conclusions, and the Commission's review of the ALJ's initial decision was plenary as to both facts and law. See 15 U.S.C. 45(b); 16 C.F.R. 3.54(a)-(b). The Commission adopted the ALJ's factual findings only to the extent consistent with its opinion; it explicitly accepted his conclusion regarding consumer injury, and explicitly rejected his conclusion concerning "market power." Pet. App. 45a, 78a-79a. It is those findings that the Act renders "conclusive" so long as they are "supported by evidence" (15 U.S.C. 45(c))—as the court of appeals held they are in this case (Pet. App. 20a-24a).

Petitioner concedes that, under any analytical framework, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." Pet. 18, quoting *NCAA v. Board of Regents*, 468 U.S. 85, 103 (1984). Under the circumstances of this case, including the Commission's findings concerning actual and potential consumer injury, the court of appeals correctly concluded that it could sustain the Commission's determination of illegality. Pet. App. 18a-20a.

As the court of appeals recognized, the Commission acted in this case on the basis of an extensive factual record. See Pet. App. 20a-24a. From that record, the Commission found that petitioner's interpretation and enforcement of its ethical canon prohibiting "false or misleading" advertising had had the actual effect of prohibiting a broad range of truthful, non-deceptive advertising. *Id.* at 64a-67a, 74a-78a. It noted that such restrictions would naturally tend to impede competition by "increas[ing] the difficulty of discovering the lowest cost seller of acceptable ability," reducing "the incentive to price competitively," and "perpetuat[ing] the market position of established [market participants]." *Id.* at 59a, quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 377-378 (1977).<sup>6</sup> And on the particular facts of record, it found that advertising containing price or quality information is important to consumers in selecting a dentist (Pet.

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<sup>6</sup> See also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) ("common sense supports the conclusion that a prohibition against price advertising, like a collusive agreement among competitors to refrain from such advertising, will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market" (footnote omitted)).

App. 76a-78a, 231a), and that such advertisements are an important tool for competition among dentists.<sup>7</sup> The Commission thus concluded that petitioner's advertising restrictions in fact "deprive[d] consumers of information they value and of healthy competition for their patronage," and were likely to reduce the output of dental services. *Id.* at 78a.<sup>8</sup> The Commission further considered petitioner's proffered pro-

<sup>7</sup> For example, an ad offering "gentle dentistry in a caring environment" had attracted 300 new patients in six months, before it was discontinued at petitioner's insistence. See Pet. App. 77a. Other evidence showed that advertising that offered a discount for new customers was markedly more effective than advertising that did not. *Ibid.* The Commission cited one instance in which a dentist who engaged in price and quality advertising saw his number of new patients increase, only to decline when petitioner forced him to delete those features from his advertisements. *Id.* at 77a-78a.

<sup>8</sup> This Court has observed that proof of actual detrimental effects on competition can obviate any need for inquiry into surrogate indicators such as market definition and market power. *Indiana Fed'n of Dentists*, 476 U.S. at 460-461. The Commission nonetheless considered the issue of market power (see Pet. App. 78a-84a), observing that the market for dental services is localized (*id.* at 82a), that petitioner's members accounted for at least 75% of dentists statewide and up to 90% in some localities (*ibid.*), and that petitioner had the ability to enforce compliance with its restrictions (*id.* at 77a n.18, 80a-84a). The evidence supporting a finding of market power in this case is comparable to that accepted by this Court and other courts of appeals in cases involving trade restraints imposed by professional associations. See, e.g., *Indiana Fed'n of Dentists*, 476 U.S. at 460; *Wilk v. AMA*, 895 F.2d 352, 360 (7th Cir.), cert. denied, 496 U.S. 927 (1990); cf. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 351-352, 354 n.29 (1982); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir.), cert. denied, 484 U.S. 977 (1987); 7 P. Areeda, *Antitrust Law* ¶ 1503, at 377 (1986).

competitive justifications for its restrictions, but found them insufficient to justify petitioner's sweeping restraints on truthful and nondeceptive advertising. *Id.* at 84a-89a.

In reviewing the Commission's decision, the court of appeals noted this Court's "repeated holdings that the scope of inquiry under the rule of reason is intended to be flexible depending on the nature of the restraint and the circumstances in which it is used." Pet. App. 20a, citing *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986), and *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 688, 692 (1978); see also *Indiana Fed'n of Dentists*, 476 U.S. at 460 (even in the absence of "naked" restraint, no "detailed market analysis" is required where there is other evidence of "genuine adverse effects on competition"); *NCAA*, 468 U.S. at 109-110 & nn. 39, 42 (no "elaborate industry analysis" is required to demonstrate the illegality of a "naked restriction on price or output"). The court agreed with the Commission that the advertising restrictions actually enforced by petitioner amounted to "fairly 'naked' restraint[s]" on price competition and output (Pet. App. 18a), and were "in effect a form of output limitation" because they "restrict[ed] the supply of information about individual dentists' services" (*id.* at 19a-20a, citing P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1505, at 693-694 (Supp. 1997)). Under those circumstances, the court concluded that the Commission's factfinding and analysis were sufficient to demonstrate the restrictions' illegality under the rule of reason. *Id.* at 20a-24a.

Petitioner's contention to the contrary (Pet. 19-22) notwithstanding, nothing in this Court's decisions precludes the court of appeals' use of a flexible and

practical rule-of-reason analysis in this case. See also Klein, *A 'Stepwise' Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, 12 Antitrust No. 2, at 41, 44 & n.10 (Spring 1998) (advocating a similar practical approach and citing the decision below with approval). Indeed, this case closely resembles *Indiana Federation of Dentists*, in which an association of dentists agreed not to send x-rays to patients' health insurers, which wanted the x-rays to determine whether proposed treatments were necessary. 476 U.S. at 449-450. The Court in that case concluded that, even if the restraint at issue was not as "naked" as that involved in *NCAA*, the FTC's findings that "in two localities \* \* \* Federation dentists constituted heavy majorities of the practicing dentists and \* \* \* as a result of the efforts of the Federation, insurers in those areas were, over a period of years, actually unable to obtain compliance with their requests for submission of x rays" were "legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis." *Id.* at 460-461. The Court observed that such a "concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified [was] likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it [could] be condemned even absent proof that it resulted in higher prices or \* \* \* the purchase of higher-priced services." *Id.* at 461-462. Compare Pet. App. 76a-78a, 79a-82a & n.20.<sup>9</sup>

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<sup>9</sup> Other courts of appeals have also held that, where it is

Nor does the court of appeals' reliance on an "abbreviated" analysis conflict with *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993), *Illinois Corporate Travel, Inc. v. American Airlines*, 806 F.2d 722 (7th Cir. 1986), or *Vogel v. American Society of Appraisers*, 744 F.2d 598 (7th Cir. 1984). See Pet. 19-29. *Brown* recognized that abbreviated analysis is appropriate in some cases (5 F.3d at 669), but it concluded, after extended consideration (*id.* at 673-678), that the pro-competitive justifications offered in that case were sufficiently compelling to require a more searching analysis. In this case, by contrast, both the Commission and the court of appeals found it possible to dispose of petitioner's proffered justifications relatively briefly. Pet. App. 19a, 84a-89a. That difference in circumstances does not amount to a conflict between the decisions.

In *Illinois Travel*, the court of appeals declined to use an abbreviated analysis to evaluate whether a private antitrust plaintiff was entitled to a preliminary injunction prohibiting an airline from imposing advertising restraints in the context of a vertical agency relationship. That decision has little relevance to this case, which arises in the very different context of horizontal restraints among competitors. See, e.g., *Business Electronics Corp. v. Sharp Elec-*

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otherwise appropriate to the circumstances, an abbreviated rule-of-reason analysis need not be premised on a showing that an agreement on its face raises price or reduces output. See, e.g., *Law v. NCAA*, 134 F.3d 1010, 1019, 1020 (10th Cir. 1998); *Lie v. St. Joseph Hospital*, 964 F.2d 567, 569-570 (6th Cir. 1992); *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir.), cert. denied, 506 U.S. 954 (1992).

tronics Corp., 485 U.S. 717, 726-727 (1988).<sup>10</sup> *Vogel*, which was also an interlocutory appeal in a private action, concluded only that there was "insufficient basis in the present record" for holding the restraint at issue—an ethical rule that prohibited appraisers from charging fees measured by a percentage of the value they attributed to the item appraised—to be a form of price fixing that must be condemned as illegal per se. 744 F.2d at 600, 603-604.

The court of appeals in this case reviewed and sustained, under a practical rule-of-reason analysis suited to the record before it, the Commission's factual and legal determination that petitioner's enforcement of broad categorical restrictions on its members' price and other advertising amounted to an unreasonable restraint of trade, and therefore violated Section 5 of the Act. The Commission's order requires only that petitioner, in the future, confine its ethical prohibitions to advertisements that it reasonably believes to be "false or deceptive" within the meaning of Section 5. In the absence of any conflict with a decision of this Court or another court of appeals, nothing in the decisions or order below warrants review by this Court.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1998

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<sup>10</sup> *American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781 (9th Cir. 1996), which followed *Illinois Corporate Travel*, also involved a vertical relationship with an agent. See *id.* at 785-786, 789-790. In any event, any conflict with that decision would be for the Ninth Circuit itself to resolve. See *Wisniewski v. United States*, 353 U.S. 901 (1957) (per curiam); see also Pet. App. 18a (distinguishing *American Ad Management*).

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No. 97-1625

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

CALIFORNIA DENTAL ASSOCIATION,

*Petitioner.*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

**REPLY BRIEF IN SUPPORT OF PETITION**

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JAPR

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## I. THIS COURT SHOULD RESOLVE THE CONFLICT OVER THE COMMISSION'S JURISDICTION

The Commission cannot deny that the Ninth Circuit explicitly found that “[a]mong the other circuits there is a split on the [jurisdictional] issue . . . .” App. 15a. Likewise, the Commission cannot contradict this Court’s previous grant of *certiorari* to resolve the conflict. *American Medical Ass’n v. FTC*, 638 F.2d 443 (2<sup>d</sup> Cir. 1980), *aff’d by an equally divided Court*, 455 U.S. 676 (1982). In its Opposition, the Commission makes two erroneous arguments: that *Community Blood Bank v. FTC*, 405 F.2d 1011 (8<sup>th</sup> Cir. 1969), held that only “charitable organizations” are exempt from the FTC Act and that the legislative history supports the Commission’s jurisdiction over nonprofit professional associations. Opp. 11-15.

In *Community Blood Bank*, the Eighth Circuit criticized the FTC for differentiating between for profit and nonprofit corporations for the purpose of defining the language “organized to carry on business for its profit.” The court noted that the Commission interpreted “profit” in a for profit corporation to mean it was organized in order that its shareholders have an equity interest in the corporation and its income and that they have an entitlement to share in the profits and in the assets upon dissolution. 405 F.2d at 1016. On the other hand, the Commission interpreted the “for profit” phrase for nonprofits more broadly because generally nonprofits do not distribute profits and their members are not entitled to the corporation’s assets upon dissolution. *Id.* The court also found the legislative history “not too illuminating” but did observe that neither the legislative history nor the language of the Act supports the Commission’s contention that Congress intended “profit” to be given different interpretations depending upon the character of the

corporation under consideration. *Id.* at 1016-17. It observed:

[B]y limiting the corporations to be embraced within the provisions of the Act, Congress intended to exclude some corporations from the Commission's jurisdiction.

*Id.* at 1017.

The court determined that the Act applied to a for profit or nonprofit if the entity engages "in business for *profit* within the traditional meaning . . . of that word" and that "profit" was gain from business or investment over and above expenditures, paid or contemplated to be paid to its shareholders or members. *Id.* It specifically defined the jurisdictional test as whether "a corporation without shares of stock . . . engages in business for *profit* within the traditional and generally accepted meaning of that word." *Id.* The record in this case is clear; CDA does not engage in business and has not paid any "profits," as defined by *Community Blood Bank*, to its members.

The Eighth Circuit's holding in *Community Blood Bank* is more expansive than the Commission's artificially narrow reading of the decision as exempting only charitable organizations.<sup>1</sup> The court's summary of its holding on the last page of the opinion succinctly states:

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<sup>1</sup> The *Community Blood Bank* court uses the terms nonprofit and charitable organization interchangeably. 405 F.2d at 1019-20. However, it is clear that no matter the term used to describe the entity, the distinguishing fact is not whether the nonprofit is a charity but whether the entity conducts business, makes a profit (as that term is traditionally and generally accepted) and either pays the profit to its shareholders or intends to do so. *Id.* at 1017. If the Commission were correct that *Community Blood Bank* only speaks to charitable organizations, the Ninth Circuit would not have found a "split" among the circuits. App. 15a. The cases relied upon by the Commission for the contention that many courts have entertained cases against trade or professional associations, Opp. 14-15, are not persuasive in that either the jurisdictional issue was not raised or the courts adopted the logic of

3. That the corporate petitioners are true nonprofit corporations, not engaged in business for profit for themselves or their members.
4. That the Commission lacks jurisdiction over all of the petitioners.

405 F.2d at 1022.

The Commission's reliance on the legislative history discussion in *Community Blood Bank* is misplaced. Opp. 11-12. Initially, the Commission fails to address the threshold issue of whether the plain language of the Act even permits an examination of the legislative history.<sup>2</sup> The Commission argues that the addition of "corporations without capital stock" to the Act was meaningful. Opp. 11. However, since it is clear under *Community Blood Bank* that the Act applies to both for profit and nonprofit entities which engage in business to make a profit and then distribute it to their members or shareholders, the addition of the language "corporations without capital stock" is irrelevant for the purpose of answering the jurisdictional test in this case.<sup>3</sup>

Despite the clear holding in *Community Blood Bank*, neither the Commission nor the Ninth Circuit made the appropriate inquiry into whether the CDA engaged in business to make a profit as that term is traditionally defined. Rather the Commission, to eviscerate Congressional intent, has used as a surrogate for "profit" the provision of

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*Community Blood Bank* that in these cases the organizations derived a "profit" in the traditional meaning of the term. See 405 F.2d at 1019.

<sup>2</sup> Cf. *Pennsylvania Dep't of Corrections v. Yeskey*, 66 U.S.L.W. 4481, 4482-83 (U.S. June 15, 1998).

<sup>3</sup> The legislative history to which the Commission cites is a letter from Joseph E. Davies, then Commissioner of the predecessor of the Federal Trade Commission, to Senator Newlands, the author of the Senate version of the Act. 405 F.2d at 1017. Mr. Davies' letter referred only to commercial associations of manufacturers or dealers, not professional associations. *Id.* at 1017-18.

"tangible, pecuniary benefits to its members." App. 16a. The Commission's approach is a clear violation of the language of the Act and Congressional intent and therefore should be reviewed by this Court.

Congress unequivocally understood how to enact antitrust legislation which covered all corporations, but it did not do so with the FTC Act. 405 F.2d at 1018.<sup>4</sup> Moreover, in 1977 when the FTC gave Congress another opportunity to include nonprofits which do not conduct business to make and distribute a profit in Section 4 of the Act, Congress declined. CDA Pet. 14-15.

This Court previously recognized the importance of accepting *certiorari* to resolve the question of whether the Commission's jurisdiction extends to nonprofit professional associations. *American Medical Ass'n*, 455 U.S. at 676. Congress plainly provided jurisdiction to the Commission over commercial and business associations and did not intend to include nonprofit professional associations such as CDA.

## II. THIS COURT SHOULD RESOLVE THE CONFLICT OVER THE "QUICK LOOK" RULE OF REASON

The Ninth Circuit used an abbreviated rule of reason to strike down conduct which had no adverse effect on competition and which had a valid, procompetitive purpose. Its improper use of the so-called "quick look" places it in conflict with the decisions of this Court and the Third and Seventh Circuits.

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<sup>4</sup> The Commission's reliance on *In re College Football Ass'n*, 117 F.T.C. 971 (1994), Opp. 13, is surprising because it did not argue this decision of the FTC before the Ninth Circuit and the court made no reference to it in its opinion. In any event *College Football* represents the Commission's erroneously narrow reading of *Community Blood Bank*.

The Commission tries to muddy this conflict by characterizing the Ninth Circuit's ruling as merely approving "detailed factfinding" and "context-sensitive" legal analysis. Opp. 16. In fact, both the Ninth Circuit's and Commission's decisions ignored the only "detailed factfinding" that is central to this case - the ALJ's finding that CDA's Code of Ethics had no adverse impact on competition. This finding was dictated by the record, as "complaint counsel have not produced any convincing evidence that CDA members have acted or could act together to raise prices or reduce output . . ." App. 262a. The Commission did not even proffer expert testimony on competitive effects. After trial, the ALJ adopted the testimony of CDA's expert, Dr. Knox:

[T]he activities of [CDA] with respect to their enforcement of their Code of Ethics relative to advertising has no impact on competition in any market in the State of California, particularly with respect to price and output.

App. 246a.<sup>5</sup>

The Commission majority disregarded these express findings, replacing facts with a presumption that CDA's conduct had anticompetitive effects. Rather than a "detailed" or "context-sensitive" approach, the Commission majority conceded that its analysis was "simple and short." App. 74a. Its conclusion - that the competitive effects were "plain" - was based solely on the nature of the conduct at issue. The Commission expressly declined to quantify any increase in prices or decrease in output. App. 78a. As Commissioner

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<sup>5</sup> The Commission now asserts that the ALJ did not adopt Dr. Knox's testimony but merely summarized it. Opp. 16. However, the ALJ quoted portions of Dr. Knox's testimony as part of his findings of fact. App. 246a. Also, the ALJ reiterated his agreement with Dr. Knox's testimony when he concurred that there was no evidence that CDA members had raised or could collectively raise prices or restrict the output of dental services. App. 262a.

Azcuenaga noted, complaint counsel "did not offer evidence . . . on fundamental elements of a rule of reason analysis . . ." App. 110a. The total lack of evidence led to her conclusion that "it is 'implausible at best' that CDA has had any significant adverse effect on competition." App. 146a.

One commentator explained the inadequacy of the evidence upon which the Commission now relies:

In all, this evidence merely established that some consumers responded to some dentists' advertisements by using their services. It could not establish that this type of advertising fostered competition or that consumers who got their information on the quality of dental care from dentists' advertisements had to do without such advertising.

....  
 . . . The fact that particular dentists who drew patients by claiming to practice "gentle dentistry" could not make such claims by virtue of a restriction does not tell us whether the restriction actually affected competition  
 ....

Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis*, 64 ANTITRUST L. J. 613, 631-32 (1996).<sup>6</sup>

The Ninth Circuit majority took the same approach as the Commission, using an abbreviated rule of reason to

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<sup>6</sup> The Commission seeks support for its abbreviated rule of reason analysis in its "finding" that the CDA has market power. Opp. 18 n.8. Commissioner Azcuenaga eviscerated this "finding" in her dissent, concluding that "[t]he evidence of market power here is so sparse and superficial as to be virtually nonexistent." App. 110a. Further, as the Commission points out in its brief, market power is merely a surrogate for determining whether a party has the power to raise prices or restrict output. Opp. 18 n.8. In this case, it is inappropriate to rely on a surrogate because the ALJ determined that CDA's conduct has not raised prices or restricted output.

summarily condemn the very conduct the ALJ found had no effect on the prices or output of dental services. In his dissent, Judge Real pinpointed the majority's error: "[T]he majority finds a restraint on competition without the supporting help from any of the economic principles . . ." App. 26a. Far from relying on the specific facts of record, the Ninth Circuit (and the Commission) struck down CDA's conduct using a myopic approach which ignored the facts and misapplied the law.<sup>7</sup>

Its use of the "quick look" places the Ninth Circuit in direct conflict with *NCAA v. Board of Regents*, where this Court expressly reserved a shortened analysis for "naked" restraints on price or output for which there are no procompetitive justifications. 468 U.S. 85, 109 (1984). The Ninth Circuit's opinion goes beyond these limits. The court conceded that CDA's policies "do not, on their face, ban truthful, nondeceptive ads" and that "the economic impact of the restraints is not immediately obvious." App. 17a-18a. With this acknowledgment, a full rule of reason analysis was required. Judge Real emphasized this point: "[t]he rules of the CDA . . . are not . . . sufficiently anti-competitive on their face to eschew a full-blown rule of reason inquiry." App. 25a.<sup>8</sup>

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<sup>7</sup> The Commission implies that the Court should ignore the ALJ's findings because the Commission's review was plenary. Opp. 16. This is a red herring. The Commission did not disavow the ALJ's finding of no competitive effect and it made no direct findings of such an effect. App. 78a. Instead, it inferred competitive effect from the nature of CDA's conduct. This inference, in the face of the ALJ's specific findings, was legal error. See, e.g., *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1143-45 (D.C. Cir. 1988) (Commission not free to apply inference of competitive injury in face of contrary ALJ findings).

<sup>8</sup> The Commission belatedly attempts to squeeze within the narrow holding of *NCAA* by asserting that CDA's practices amounted to an "output limitation" as they supposedly "restrict[ed] the supply of information . . ." Opp. 19. However, the market at issue is dental

The Ninth Circuit's decision also conflicts with Judge Easterbrook's decision in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722 (7<sup>th</sup> Cir. 1986), and the Ninth Circuit's previous decision in *American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781 (9<sup>th</sup> Cir. 1996). In both cases, the courts refused to apply an abbreviated rule of reason because the practices at issue were not, on their face, restraints on price or output.<sup>9</sup>

The Ninth Circuit also placed itself at odds with the Third and Seventh Circuits by applying the "quick look" after CDA had proffered a procompetitive rationale. The Court of Appeals agreed that the purpose of CDA's ethical rules is to "prevent[] false and misleading advertising." App. 18a. Confronted with this procompetitive end, the Commission was required to conduct a full-scale analysis of competitive effects, as in *United States v. Brown Univ.*, 5 F.3d 658, 678 (3<sup>rd</sup> Cir. 1993), and *Vogel v. American Soc'y of Appraisers*, 744 F.2d 598 (7<sup>th</sup> Cir. 1984).<sup>10</sup>

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services and the ALJ found that the supposed restriction on information did not restrain the output of dental services. App. 82a, 262a.

<sup>9</sup> The Commission attempts to distinguish these decisions as involving vertical restraints. Opp. 21 & n.10. *American Ad Management* involved an alleged horizontal agreement among competitors. 92 F.3d at 784-85. In *Illinois Corporate Travel*, the court held that a vertical prohibition against discount advertising was "functionally" a price restriction, but its potential economic benefits precluded summary condemnation. 806 F.2d at 728-29. As CDA's advertising rules also have economic benefits, the vertical nature of *Illinois Corporate Travel* does not distinguish it from this case.

<sup>10</sup> The Commission ignores *Brown* except to state that the Third Circuit required a full rule of reason analysis after a procompetitive rationale was tendered by the defendant, while the Ninth Circuit did not. Opp. 21. Rather than distinguishing *Brown*, this is an admission that the two courts applied conflicting legal standards. As for *Vogel*, the Commission suggests that the Seventh Circuit merely refused to find that the restraint at issue was *per se* illegal. Opp. 22. Not so. Judge Posner expressly declined to invalidate an ethical bylaw under a "quick look," requiring a full rule of reason analysis. 744 F.2d at 603-04.

Contrary to the Commission's claim, *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) ("*IFD*"), does not support summary condemnation of CDA's conduct. In *IFD*, a group of dentists organized a "union" solely to evade the antitrust laws. It promulgated a "work rule" which prohibited members from supplying x-rays to insurers. This Court held that such transparently anticompetitive conduct violated the rule of reason because it caused "actual, sustained adverse effects on competition." *Id.* at 461.<sup>11</sup>

Had either the Commission or Ninth Circuit conducted a full rule of reason inquiry in this case, it could not have condemned CDA's conduct. The ALJ found that complaint counsel had failed to satisfy the rule of reason as there was no adverse effect on price or output. App. 245a, 246a, 262a. Because "the criterion to be used in judging the validity of a restraint on trade is its impact on competition," the Ninth Circuit's use of an analytical short-cut to strike down CDA's practices where no impact was shown, turns the rule of reason on its head. *See NCAA*, 468 U.S. at 104.

The Commission does not dispute the public importance of CDA's Petition. By departing from *NCAA* and creating a split within the circuits, the Ninth Circuit majority has caused uncertainty regarding when and how the abbreviated rule of reason will be applied. Uncertainty in the application of the antitrust laws chills lawful, efficient business practices. *United States v. Philadelphia Nat'l Bank*, 374

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<sup>11</sup> The Commission wrongly claims that the Ninth Circuit's abbreviated rule of reason is in harmony with other courts of appeal. Opp. 20 n.9. In *Law v. NCAA*, 134 F.3d 1010, 1020 (10<sup>th</sup> Cir. 1998) and *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 674 (7<sup>th</sup> Cir. 1992), the courts applied the quick look because, unlike this case, they were confronted with naked restraints on price or output. In *Lie v. St. Joseph Hosp.*, the court refused to apply an abbreviated rule of reason because the plaintiff failed to show a naked restraint and the challenged practice had a procompetitive purpose. 964 F.2d 567, 570 (6<sup>th</sup> Cir. 1992).

U.S. 321, 362 (1963); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235-36 (1<sup>st</sup> Cir. 1983). The Ninth Circuit's ruling will unquestionably have such a chilling effect. Prior to *CDA*, businesses could expect that a practice, which is not *per se* illegal or a naked restraint on price or output, is permissible, unless it is shown that its anticompetitive effects outweigh its procompetitive benefits. The Ninth Circuit's decision clouds that expectation. It permits a court to strike down a practice which has no effect on price or output and which has a procompetitive purpose.

### CONCLUSION

For all the foregoing reasons, a writ of certiorari should be issued in this matter.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

**CALIFORNIA DENTAL ASSOCIATION,**  
*Petitioner,*

v.

**FEDERAL TRADE COMMISSION,**  
*Respondent.*

On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

**BRIEF OF THE AMERICAN DENTAL ASSOCIATION,  
NATIONAL SOCIETY OF PROFESSIONAL  
ENGINEERS, AND AMERICAN SOCIETY OF  
ASSOCIATION EXECUTIVES AS *AMICI CURIAE* IN  
SUPPORT OF PETITIONER**

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## INTEREST OF THE AMICI

Amicus American Dental Association ("ADA") is the oldest and largest national association of dentists in the United States. It is dedicated to furthering the education and training of dentists so that they may fulfill their "overriding obligation . . . to provide quality care in a competent and timely manner." See ADA, *Principles of Ethics and Code of Professional Conduct* 1 (1995).<sup>1</sup> Through the ADA, members of the profession also carry out the "privilege and obligation of self-government," *id.*, including the promulgation of ethical guidelines. The ADA's strong interest in responsible self-regulation in the dental profession will be undercut unless the decision of the Court of Appeals is reversed.

The National Society of Professional Engineers ("NSPE") is an individual professional membership association of over 60,000 licensed engineers practicing in government, industry, education, construction and private practice. Its mission is to promote the ethical, competent and licensed practice of engineering. Through its many programs, NSPE helps establish educational and licensure standards for the protection of the public health and safety. Its *Code of Ethics for Engineers* encourages all engineers to practice consistent with those standards. NSPE's interests in self-regulation and in promoting the interests of the public will be undermined if the decision of the Court of Appeals is not reversed.

The American Society of Association Executives ("ASAE") is a not-for-profit, tax-exempt organization which, since its

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<sup>1</sup> Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus* and its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and the consent letters have been filed with the Clerk of the Court.

founding in 1920, has been dedicated to improving the performance and effectiveness of voluntary membership organizations, enhancing the professionalism of association executives, and encouraging participation by association executives and their associations in public policy issues. ASAE members -- approximately 24,000 association executives and staff, as well as representatives of suppliers of goods and services to the association community -- manage charitable and philanthropic organizations, professional societies, and trade associations. Many of these groups are professional societies that develop and issue ethical standards and guidelines for their members.

### SUMMARY OF ARGUMENT

This case presents a question which this Court has previously considered but did not resolve: Whether the Federal Trade Commission ("FTC") has jurisdiction over nonprofit, professional associations. See *American Medical Ass'n ("AMA") v. FTC*, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided court, 455 U.S. 676 (1982). The petition for certiorari gives this Court another opportunity to settle this recurring question. The petition also presents an issue of antitrust law that is important to all entities, but particularly important to professional associations which strive to develop ethical positions designed to benefit consumers: Whether the so-called "quick look" rule of reason analysis is properly employed to strike down ethical guidelines directed against deceptive practices without any serious analysis of the competitive significance of those guidelines. Both of these issues merit review by this Court.

1. In stark contrast to the sweeping language of the contemporaneously enacted Clayton Act, the FTC Act expressly limits FTC jurisdiction to corporations "organized to carry on business for [their] own profit or that of [their] members." 15

U.S.C. § 44. Nothing in the language or in pertinent legislative history indicates that Congress intended to give the FTC jurisdiction over nonprofit, professional societies. Rather, Congress vested antitrust authority over these entities exclusively in the federal courts enforcing the Sherman Act. Part I.A.

The court below failed to determine whether petitioner California Dental Association ("CDA") is "organized to carry on business for . . . profit." Instead, it considered only whether the CDA "provides tangible, pecuniary benefits to its members." 128 F.3d at 726. This faulty inquiry does violence to the plain meaning of the word "profit" and ignores the limiting effect of the statutory phrase "organized to carry on business for." Part I.A.

The court of appeals acknowledged that the scope of FTC jurisdiction over nonprofit, professional associations has divided the courts of appeals. See 128 F.3d at 725-26. Its decision is consistent with that of the Second Circuit in *AMA v. FTC*, but is squarely in conflict with the decision of the Eighth Circuit in *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (1969). That case correctly recognized that an association is not a business carried on for profit because its activities confer some incidental economic benefit upon its members. Part I.B.

Resolution of the conflict among the courts of appeals is of great importance to nonprofit, professional associations and to the public. In recent years, the FTC has devoted substantial resources to public and nonpublic investigations of such entities, diverting the attention and funds of professional associations from their nonprofit activities and discouraging responsible efforts at professional self-regulation. Part I.C.

2. This Court should also grant the writ in order to resolve the conflict between the decision below and precedent of this Court and the courts of appeals regarding the proper application of the "quick look" rule of reason analysis in antitrust cases. The Ninth Circuit used quick look analysis to condemn canons of professional ethics as anticompetitive without undertaking any serious economic analysis of their competitive significance despite the procompetitive purpose and effect of these canons. This approach is inconsistent with this Court's decisions which make clear that the quick look approach is confined to the exceptional circumstance in "which no elaborate industry analysis is required to demonstrate the anticompetitive character" of an inherently suspect restraint of trade. See *NCAA v. Board of Regents*, 468 U.S. 85, 109 (1984)(citation omitted).

At issue here are ethical positions which require certain disclosures to prevent deception in price advertising and which provide that certain nonverifiable claims of quality service are deceptive. Far from being naked restraints of trade, the guidelines are supported by strong procompetitive justifications, most notably the necessity of ensuring accurate information in the marketplace. This Court has already indicated that, given "[t]he public service aspect, and other features of the professions," *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975), courts must closely scrutinize professional ethical guidelines challenged as restraints of trade. This Court's jurisprudence makes plain that any such rule which is not a naked restraint of trade may not be invalidated after only a quick look. Part II.A.

The decision below, moreover, cannot be reconciled with decisions of this Court recognizing that professional ethical rules that prohibit misleading or deceptive advertising are procompetitive. Professional associations "have a special role to play" in preventing misleading or deceptive professional

advertising, *Bates v. State Bar*, 433 U.S. 350, 384 (1977). Indeed, this Court has noted that ethical rules governing professional advertising that require additional disclosures (instead of prohibiting speech) and that ban unverifiable claims serve procompetitive purposes. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). In addition, ethical rules that prevent inaccurate advertisements are procompetitive because they make professional services more attractive to a public increasingly cynical about professional claims and conduct. Cf. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). Part II.B.

The decision below also conflicts with decisions of other courts of appeals which recognize that the quick look analysis is appropriate only in those narrow circumstances in which a restraint is inherently suspect and not susceptible to a procompetitive justification. Of particular note is *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993). There, the Third Circuit reversed a trial court's application of the quick look analysis to invalidate a college association's agreement to coordinate financial aid awards. In an analysis applicable here, the court of appeals pointed to the nonprofit nature of the college association and the procompetitive justifications it offered and held that a full rule of reason analysis was required. *Id.* at 678. Part II.C.

The FTC's wrongful assertion of authority here resulted in its misguided condemnation of the ethical positions at issue without a thorough analysis of their competitive consequences. The short-cut approaches taken by the FTC and the court below resulted in the invalidation of ethical canons with procompetitive effects that far exceed any imagined restraint of trade. Both holdings below chill numerous nonprofit professional associations' legitimate self-regulatory activities. See Part II.D. For these reasons, the Court should hear this case and reverse the decision below.

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE IMPORTANT ISSUE OF WHETHER THE FTC HAS JURISDICTION OVER NONPROFIT, PROFESSIONAL ASSOCIATIONS.

A. The starting point in determining the scope of the FTC's jurisdiction is the language of the FTC Act. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Unlike the Sherman Act, the FTC Act does not apply to all entities. Rather, section 5(a)(2) of the Act, 15 U.S.C. § 45(a)(2), explicitly limits the FTC's jurisdiction to "persons, partnerships, [and] corporations." Section 4 of the Act, 15 U.S.C. § 44, in turn, carefully defines the "corporations" that are subject to the Act. Specifically, an association is a "corporation" subject to FTC jurisdiction only if it is "organized to carry on business for its own profit or that of its members."<sup>2</sup>

The language of sections 4 and 5 of the FTC Act reflects Congress' intention to limit the FTC's jurisdiction to for-profit, commercial entities and associations that seek to increase the profit of such entities. That intention is best evinced by contrasting the FTC Act's jurisdictional provisions with those in the contemporaneously enacted Clayton Act. The same Congress that limited the FTC's jurisdiction to corporations

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<sup>2</sup> Section 4, enacted in 1914, provides:

"Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members. 38 Stat. 717, 719.

"organized to carry on business for . . . profit" expressly made the Clayton Act (like the Sherman Act before it) applicable to *all* associations.<sup>3</sup> See *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 277 (1975) (Clayton and FTC Acts to be construed together). By limiting FTC jurisdiction to corporations organized for profit while making all associations subject to the Sherman and Clayton Acts, Congress excluded nonprofit, professional associations from FTC jurisdiction and gave the federal courts that enforce the Sherman Act exclusive antitrust jurisdiction over them.

The legislative history of the FTC Act adds force to the language. The entire thrust of the Act's history is that the Commission was created to develop expertise concerning industrial and commercial entities and thus be better able to apply national antitrust policy to such entities than would a court.<sup>4</sup> No representatives of professional or nonprofit associations were invited to testify about the FTC Act. Nothing in the Act's language or history in any way suggests a congressional concern with the activities of nonprofit, professional associations. Cf. *United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 336 (1952) (market for medical and professional services presents issues "quite different than the usual considerations prevailing in ordinary commercial matters").

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<sup>3</sup> The Clayton Act (15 U.S.C. §§ 12-27), like the Sherman Act (15 U.S.C. §§ 1-7) applies to all "persons." Both statutes define "persons" to "include" all "associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." See 15 U.S.C. §§ 7, 12.

<sup>4</sup> See, e.g., H.R. Rep. No. 63-1142, at 18-99 (1914); S. Rep. No. 63-597, at 8-9, 11, 28 (1914). See also *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1017-18 (8th Cir. 1969) (describing legislative history).

Indeed, in 1977, when the FTC sought legislation to expand its jurisdiction to nonprofit associations, Congress refused to accede:

Clearly, the original FTC law was not intended to cover non-business activities. . . . [T]he agency has more than enough to do in regulating business concerns without the need to expand its jurisdiction to regulate non-business groups -- groups which are completely different from business organizations in purpose, intent, and "ownership." . . . [D]uring hearings on the bill . . . [o]rganizations, including the American Association of Medical Colleges, the American Dental Association, and the American Medical Association pointed out the detrimental and potentially debilitating effects upon the non-business activities of not-for-profit organizations that FTC regulation could have. 123 Cong. Rec. H33,622 (daily ed. Oct. 13, 1977) (remarks of Rep. Broyhill).<sup>5</sup>

This later legislative history "throw[s] a cross light" on the intent of Congress in 1914 that, together with the language and legislative history of the 1914 FTC Act, confirms that the FTC lacks jurisdiction over nonprofit, professional associations. See *Pipefitters Local 562 v. United States*, 407 U.S. 385, 412 (1972) (actions of later Congress, in combination with language and history of earlier enactment, may illuminate meaning of earlier enactment).

<sup>5</sup> See also H.R. Rep. No. 95-339, at 120 (1977) (minority report) ("At the present time, the jurisdiction of the Commission is limited to profit-making bodies. The effect of this provision would have been to extend the regulatory reach of the FTC to non-profit organizations. The full Committee deleted this provision and we fully concur in the Committee's decision in this regard. In reviewing the record, we note that the FTC made a very weak case for extending its jurisdiction in this fashion. On the other hand, the non-profit groups presented a very strong case in favor of deleting the new provision.")

Despite the language and legislative history of the FTC Act, the court of appeals held that although a nonprofit, professional association "may not directly distribute 'gain' to [its] members in the same sense as a for-profit corporation," it is nonetheless a "corporation" subject to FTC regulation if "the organization provides tangible, pecuniary benefits to its members." 128 F.3d 720, 726 (1997). This ruling does violence to the plain language of the Act. The Act speaks of corporations "organized to carry on business for . . . profit" -- not associations that are "organized" as non-profits but that provide some "pecuniary benefit" for members. The lower court's omission of the words "organized to carry on business for" and its substitution of "pecuniary benefits" for the statutory term "profit" make manifest its distortion of the language of section 4.<sup>6</sup>

B. As the Ninth Circuit itself acknowledged, the scope of FTC jurisdiction over nonprofit, professional associations has divided the courts of appeals. 128 F.3d at 725-26. The holding below is consistent with the Second Circuit's decision in *AMA v. FTC*, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided court, 455 U.S. 676 (1982). However, it is squarely in conflict with *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969). In *AMA v. FTC*, this Court granted certiorari to resolve the conflict among the courts of appeals, but it divided equally and so the conflict remains.

<sup>6</sup> The FTC has consistently sought to justify its assertion of jurisdiction over nonprofit professional associations by referring to cases in which this Court and the parties apparently assumed that the FTC had jurisdiction over a trade association. See, e.g., *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Millinery Creators Guild, Inc. v. FTC*, 312 U.S. 469 (1941). These cases do not suggest, contrary to the language and legislative history of the Act, that Congress intended to subject nonprofit, professional associations to FTC jurisdiction. They simply reflect the FTC's jurisdiction over the industrial and commercial businesses at issue in the prior cases.

In *Community Blood Bank v. FTC*, the Eighth Circuit held that a nonprofit hospital association and a community blood bank were outside the FTC's authority. The hospital association closely resembled petitioner CDA in this case. Like the CDA, it was organized as a nonprofit corporation and performed numerous eleemosynary functions. In addition, however, the hospital association served the business interests of its member hospitals -- assisting in the training and procurement of personnel, providing coordinated planning and financing, and furnishing a forum for resolving questions by pathologists. See 70 F.T.C. 728, 863-64 (1966), annulled 405 F.2d 1011 (1969). Indeed, the FTC specifically found that the association "performed very valuable services" for its members. *Id.* at 864.

Nevertheless, the Eighth Circuit recognized that the test of jurisdiction under the FTC Act is whether an entity is "organized to" carry on "business for profit" within the traditional meaning of that language." 405 F.2d at 1018. Profit is gain from business or investment over and above expenses, not some incidental economic benefit conferred by an association's activities. Thus, the court held that whether the FTC has jurisdiction over a corporation depends on the "reality" of whether the corporation "in law and in fact" operates as a nonprofit organization. 405 F.2d at 1019. As the court observed:

[t]he uncontradicted evidence shows, and the Commission found, that *no part of any funds received by Community and AHA have ever been distributed or inured to the benefit of any of their members, directors or officers; all receipts have been used exclusively for the purposes authorized by law and their articles of incorporation; all funds received by Community originated from gifts, loans and grants, replacement blood donations and payment of responsibility and*

*processing fees; AHA received its funds from grants, loans, gifts and dues of member hospitals.* Of added significance is the finding that the receipts by Community have not been sufficient to meet expenses and to repay outstanding loans. *Id.* at 1020 (emphasis supplied).

Under the test applied by the Eighth Circuit, petitioner CDA would not be subject to FTC jurisdiction.

Like the Ninth Circuit, the Second Circuit has adopted an unduly expansive reading of the phrase "organized to carry on business for . . . profit." In a case involving the American Medical Association, the court held that despite that Association's myriad charitable functions and activities, the AMA also engaged in sufficient business activities to be held a proper subject of FTC jurisdiction. Specifically, the Second Circuit determined that an organization is subject to FTC authority as long as its activities provide some "economic benefit" to its members -- a test with only a tenuous connection to the statutory requirement that an entity actually be "organized to carry on business for . . . profit." In this case, the Ninth Circuit effectively adopted the Second Circuit's test when it held that a nonprofit association is within FTC jurisdiction if it "provide[s] tangible, pecuniary benefits to its members." 128 F.3d at 726.

The analysis of the Eighth Circuit in *Community Blood Bank v. FTC* is correct. The carefully circumscribed definition of "corporation" enacted by Congress in section 4 of the FTC Act will mean little if nonprofit associations which are organized to advance science, education, public health, professional ethics, or *pro bono* activities become subject to FTC jurisdiction any time that they offer a credit card, favorable rental car rates, or insurance benefits to members.

C. The question of the scope of the FTC's authority is of great importance to nonprofit, professional associations and the public. Since the *Goldfarb v. Virginia State Bar* decision in 1975, 421 U.S. 773, the FTC has made regulation of such associations a priority. The petition for certiorari lists (at page 10 n.2) numerous published FTC challenges since 1990 to activities by these associations. What the petition could not set forth, however, are the numerous nonpublic challenges to professional associations' activities that were closed, often after extensive investigations.

The FTC's persistent efforts to extend its jurisdiction beyond congressionally-prescribed limits has caused significant harm. First, every time that such an association is subjected to an FTC investigation, its limited resources are diverted from the non-profit activities for which they were intended. Second, the association's conduct is adjudicated by a tribunal which was not intended to have, and which does not have, expertise in the unique considerations involved in antitrust analysis of conduct by nonprofit, professional associations. The harmful consequences of the FTC's wrongful assertion of jurisdiction are evident here: Ethical guidelines that promote the public interest have been called into question and invalidated. Moreover, there is absolutely no need to expose professional associations and society as a whole to these costs. Nonprofit, professional associations are unquestionably subject to antitrust actions in federal court brought under the Sherman Act.

This Court should resolve the conflict in the courts of appeals and decide whether Congress gave the FTC jurisdiction over nonprofit, professional associations.

II. THIS COURT SHOULD RESOLVE THE CONFUSION OVER PROPER APPLICATION OF THE QUICK LOOK RULE OF REASON AND SHOULD HOLD THAT ETHICAL GUIDELINES HAVING PLAUSIBLE PROCOMPETITIVE EFFECTS MAY NOT BE INVALIDATED WITHOUT AN ECONOMICALLY SOUND ANALYSIS OF THE COMPETITIVE SIGNIFICANCE OF SUCH GUIDELINES.

A. The decision below cannot be reconciled with prior decisions of this Court that delineate when traditional rule of reason analysis in antitrust cases may be replaced by a "quick look" analysis. See *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *State Oil Co. v. Kahn*, 118 S. Ct. 275, 279 (1997). In traditional rule of reason analysis, "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.). A defendant's motive is relevant -- "not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Id.* at 238.

In *NCAA v. Board of Regents*, this Court permitted use of an abbreviated, or "quick look," rule of reason in certain limited situations. 468 U.S. at 109 n.39. Specifically, use of the quick look approach was restricted to the exceptional circumstance in which "no elaborate industry analysis is required to demonstrate the anticompetitive character" of an inherently suspect restraint, *id.* at 109 (quoting *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978)); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) (same). Here, the ethical guidelines in question -- which require additional disclosures to reduce the potential for deception in

price advertising and which express the view that certain quality claims are deceptive — are hardly inherently suspect. If quick look analysis may be used to strike down the ethical guidelines here, it is properly applicable in any case, and the narrow exception recognized in *NCAA v. Board of Regents* will have swallowed the traditional rule of reason.

Equally to the point, petitioner CDA is a nonprofit, professional association which has promulgated ethical rules with an intent to further acknowledged public interests and with no intent to harm competition. This Court has repeatedly observed that "by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary." *National Society of Professional Engineers*, 435 U.S. at 696. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, the Court explained that:

[t]he fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether the particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. *Id.* at 788-89 n.17.

Accordingly, *NCAA v. Board of Regents* and *Goldfarb v. Virginia State Bar* and their progeny require a thoughtful analysis of how professional ethical guidelines may affect competition where, as here, those guidelines do not clearly affect price or output and may serve procompetitive purposes.

In other words, the important interests represented by petitioner's ethical rules may not be cavalierly dismissed after only a quick look unless they are plainly anticompetitive. It is wrong both to assume, as the court below did, that such guidelines are anticompetitive and to place the burden of proof on the association to show that they are not.<sup>7</sup>

B. The decision below also is in substantial tension with authority of this Court recognizing the procompetitive nature of efforts by professional societies to regulate deceptive or misleading advertising by their members. In *National Society of Professional Engineers*, this Court held that "the problem of professional deception is a proper subject of an ethical canon." 435 U.S. at 696. Indeed, nearly fifty years ago, this Court recognized that:

The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 612 (1935).

Responsible efforts to protect the public from deception promote the public interest and are procompetitive. See *Bates v. State Bar*, 433 U.S. at 384 (the professions "have a special role to play" in resolving the "problems in defining the boundary between deceptive and nondeceptive advertising" and in

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<sup>7</sup> An ethical guideline defining deceptive practices does not propose a commercial transaction or tout a particular product or service. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 n.5 (1980). Rather, it constitutes the opinion of a profession on matters of substantial public interest and importance.

assuring that advertising by professionals "flows both freely and cleanly").

The price regulation at issue forbids incomplete pricing disclosures: It requires dentists who advertise discounts to include information necessary to consumer comprehension of the discount; and it forbids claims of low prices that do not answer the question "Low compared to what?" The nonprice restrictions prohibit dentists from making claims of quality or comfort that are not verifiable.

Both rules seek to prevent misleading and deceptive advertising -- a goal which, if achieved, will promote competition by ensuring that consumers receive accurate information about services. See *Bates v. State Bar*, 433 U.S. at 364 ("commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system") (citing *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603-04 (1967) (Harlan, J., concurring)).<sup>8</sup>

This Court has previously recognized the procompetitive and public interests served by both categories of professional self-regulation at issue, albeit in the context of First Amendment challenges to professional ethics rules. In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court addressed the question whether a state ethical rule requiring attorneys to make certain pricing disclosures ran afoul of the

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<sup>8</sup> The ethical rules at issue here bear no resemblance to the restraints of trade addressed in *National Society of Professional Engineers*, 435 U.S. at 684-85 (an ethical rule banning all competitive bidding by professional engineers), and *Indiana Federation of Dentists*, 476 U.S. at 462-63 (a concerted refusal by dentists to provide insurance companies with dental x-rays to determine whether to reimburse a patient for a particular treatment). Unlike the rules at issue in those cases, the ethical canons of the CDA have been supported by strong procompetitive justifications.

First Amendment. The Court upheld state law requirements that attorneys who advertise their willingness to represent clients on a contingent-fee basis also state the contingent-fee rate and that the client may have to bear certain expenses even if he or she loses. *Id.* at 650-653 & n.15. In so doing, the Court relied on the "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. Critically for purposes of this case, the Court reasoned that disclosure requirements generally provide information of value to consumers -- *i.e.*, are procompetitive -- and should be upheld "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651 (footnote omitted).

In *Bates v. State Bar*, the Court distinguished rules mandating that attorneys follow certain pricing practices from rules restricting attorneys' claims about the quality of their services. The Court stated that "claims as to the quality of services" may be deceptive to the public where they are "not susceptible of measurement or verification" and therefore are "so likely to be misleading as to warrant restriction." 433 U.S. at 383-84. See also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 640 n.9. Ethical rules forbidding misleading and deceptive advertising promote competition by protecting the clean flow of information in the marketplace.

Finally, this Court has recognized that a practice may result in improvement in the quality of a product or a service that enhances the public's desire for that product or service and may therefore be procompetitive. See *NCAA v. Board of Regents*, 468 U.S. at 114-15. Both the state of California and petitioner reasonably concluded that misleading and deceptive advertising practices of dentists may well disserve the public and bring the profession into disrepute. Self-regulation of the sort at issue here makes services offered by the profession more attractive and is therefore procompetitive. Cf. *Florida Bar v. Went For*

*It, Inc.*, 515 U.S. 618, 625, 635 (1995) (upholding prohibitions on attorney solicitation justified as necessary to "protect the flagging reputations of Florida lawyers" and to "prevent[] the erosion of confidence in 'the profession'").

In sum, petitioner's ethical guidelines were supported by substantial procompetitive purposes. Use of the quick look analysis to void these guidelines was error.

C. The ruling below also conflicts with decisions of other courts of appeals which have been faithful to this Court's teaching that quick look analysis is inappropriate unless a restraint is inherently suspect and unsupported by any procompetitive justification. For example, in *United States v. Brown University*, 5 F.3d 658, 678 (3d Cir. 1993), the Third Circuit reversed a district court decision applying an abbreviated rule of reason analysis to a college association's agreement to award financial aid only to needy students and to set the amount of family contribution paid by commonly admitted students. In words clearly analogous here, the court held that

[t]he nature of higher education, and the asserted procompetitive and pro-consumer features of the [agreement], convince us that a full rule of reason analysis is in order here. It may be that institutions of higher education "require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Id.* at 678 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. at 788 n.17).

See also *Chicago Prof. Sports Ltd. v. National Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (holding that the NBA is "sufficiently integrated" that its rules governing the television broadcast of games cannot be condemned as anticompetitive without a full rule of reason analysis); *Illinois Corporate Travel*,

*Inc. v. American Airlines, Inc.*, 806 F.2d 722, 727 (7th Cir. 1986) (quick look rule of reason analysis is not appropriate "[u]nless the practice 'almost always' makes consumers worse off") (citations omitted); *Vogel v. American Society of Appraisers*, 744 F.2d 598, 603 (7th Cir. 1984) (refusing to apply quick look rule of reason analysis to an ethical bylaw unless "it has clear anticompetitive consequences and lacks any redeeming competitive virtues").

D. Application of a quick look rule of reason analysis to the ethical guidelines of professional associations would expose to unwarranted antitrust condemnation legitimate pronouncements that serve the public interest. Numerous professional associations, including the American Bar Association ("ABA"), the AMA, and the ADA, promulgate ethical rules and promote ethical behavior by engaging in responsible professional self-regulation. Each of the aforementioned associations issues ethical rules designed and intended to prevent misleading and deceptive advertising.

For example, Part 7 of the ABA's Model Rules of Professional Conduct addresses lawyer advertising. Center for Prof'l Responsibility, ABA, *Annotated Model Rules of Professional Conduct* 483 (3d ed. 1996). Rule 7.1 forbids lawyers to make any "false or misleading communication"; subsection 7.1(b) defines as false and misleading any statement "likely to create an unjustified expectation about results the lawyer can achieve" and subsection 7.1(c) similarly defines any statement comparing a lawyer's services with those of any other lawyer "unless the comparison can be factually substantiated." *Id.* These prohibitions bear a close resemblance to the CDA ethical statements at issue. See also Opinion 5.02, AMA, *Code of Medical Ethics* (1994) (interpreting the prohibition of false and misleading statements to encompass incomplete pricing disclosures and subjective claims about the quality of medical

services); Section 5-A, ADA, *Principles of Ethics and Code of Professional Conduct* 8 (1995)(to same effect).

These ethical positions serve the public interest in accurate information in the marketplace, in prevention of the injuries and mistrust bred by irresponsible, inaccurate professional advertisements, and in the conservation of social resources that results from effective professional self-regulation. They are precisely the sort of practices that should not be condemned without full consideration of their purposes, their benefits, and their context -- that is, that should receive full rule of reason analysis.

\* \* \* \*

In two respects, the FTC overreached in this case: First, the FTC exceeded the proper scope of its authority by challenging the ethical rules of a nonprofit, professional association. Second, it demonstrated why Congress decided not to burden nonprofit, professional associations with administrative regulation. It condemned a responsible effort at self-regulation without any economic analysis of the regulation's effect on competition. A writ of certiorari should be granted (a) to resolve the conflict in the circuits on the scope of FTC jurisdiction over nonprofit, professional associations and (b) to resolve the conflict with precedent of this Court and other courts of appeals on proper application of the quick look rule of reason.

## CONCLUSION

For all of these reasons, the petition for certiorari in this case should be granted.

Respectfully submitted,

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OCTOBER TERM 1997

CALIFORNIA DENTAL ASSOCIATION,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN COLLEGE FOR  
ADVANCEMENT IN MEDICINE  
AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER

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**QUESTION PRESENTED**

Whether, under Section 4 of the Federal Trade Commission Act, the FTC's jurisdiction over entities "organized to carry on business for [their] own profit or that of [their] members" extends to nonprofit professional associations.

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## INTEREST OF AMICUS CURIAE

The American College for Advancement in Medicine (ACAM) is a nonprofit medical society dedicated solely to scientific, educational and public health purposes. ACAM's activities consist of educating physicians, advancing and supporting scientific research, and developing public awareness of emerging therapies in complementary/alternative medicine and preventive medical practices. ACAM is an accredited sponsor of the Accreditation Council for Continuing Medical Education (ACCME). Membership in ACAM requires an unrestricted license to practice medicine. ACAM has nearly 1000 members.<sup>1/</sup>

As set forth in its Articles of Incorporation, ACAM is organized solely for nonprofit purposes and is prohibited from carrying on any activity for the profit of its members or distributing any gains, profits or dividends to its members.<sup>2/</sup>

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<sup>1/</sup> Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus* and its counsel made any monetary contribution to the preparation or submission of this brief.

Pursuant to Rule 37.2(a) of the Rules of this Court, *amicus* states that both parties have granted written consent to the filing of this brief. The parties' consent letters have been filed with the Clerk of the Court.

<sup>2/</sup> ACAM's Articles of Incorporation state in pertinent part:

This corporation is not organized, nor shall it be operated for pecuniary gain or profit, and it does not contemplate the distribution of gains, profits, or dividends to its members and is organized solely for nonprofit purposes. The property, assets, profits and net income of this corporation are irrevocably dedicated to scientific and educational purposes.

ACAM operates in fact as a bona fide nonprofit medical society.

As a nonprofit professional association, ACAM has a strong interest in the jurisdictional issue raised in the petition for certiorari. ACAM's interest is heightened by the fact that it is the target of an ongoing FTC law enforcement investigation that is depleting its resources and inhibiting its and its members' ability to engage in the free exchange of ideas concerning the use of complementary and alternative medical therapies.

### **SUMMARY OF ARGUMENT**

Congress limited the jurisdiction of the Federal Trade Commission ("FTC") to entities that are "organized to carry on business for [their] own profit or that of [their] members." 15 U.S.C. § 44. The application of this statutory exemption to nonprofit professional associations has been a matter of considerable controversy and confusion and there is currently a conflict among the circuits on this issue. A single, clear test for determining jurisdiction is needed to give direction to the FTC and reliable guidance to the professional association community. Applying a test that attempts to measure the amount of "pecuniary benefit" various associations' activities confer on their members, the FTC has taken an increasingly expansive enforcement approach with respect to its jurisdiction over professional associations, even while the position it asserts in its litigated cases and before Congress continues to define, as

required by Section 4 of the FTC Act, an apparently narrow basis for jurisdiction.

There is an urgent need for this Court to resolve the conflict in the circuits and to articulate a clear test for determining when, if ever, the FTC's jurisdiction extends to nonprofit professional associations – a category of nonprofit entities that has been subjected to a particularly high level of FTC regulatory intervention in recent years. Currently, in the two circuits that have adopted the "pecuniary benefit" test, any association that enhances the state of the science it studies, preserves the ethics its members observe, improves the quality of the care they provide, or advises regulators of the benefits and costs of public policies risks subjecting itself to the jurisdiction of the FTC. This cannot be what Congress intended when it prohibited the Commission from asserting authority over nonprofit associations. The Court should direct the Commission to follow the Eighth Circuit's interpretation of the statutory limitation on its jurisdiction over nonprofit associations and clarify the kinds of association activities that might bring a nonprofit association within the Commission's jurisdiction. In addition, the Court should confirm that the FTC Act does not permit the Commission to assert jurisdiction over exempt activities simply because a professional association engages in some business activity.

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and no part of the profits or net income of this corporation shall ever enure to the benefit of any director, officer, or member or to the benefit of any private shareholder or individual.

## REASONS FOR GRANTING THE PETITION

### I. THERE IS AN URGENT NEED TO RESOLVE THE CONFLICT IN THE CIRCUITS AND TO ARTICULATE A CLEAR TEST FOR DETERMINING WHEN, IF EVER, THE FTC HAS JURISDICTION OVER NONPROFIT PROFESSIONAL ASSOCIATIONS

The court below acknowledged that there is a conflict among the circuits on the question of when, if ever, the FTC has jurisdiction over nonprofit professional associations. The conflict alone puts nonprofit associations in a position of uncertainty that inhibits their legitimate public service and member service activities. The uncertainty, however, is compounded by the fact that the jurisdictional test that has been adopted in two circuits is so broad that it would permit the FTC to regulate virtually any activity of any association. This situation arose out of cases from the Eighth and Second circuits during the past three decades.

In 1969, the Eighth Circuit addressed the question of the FTC's jurisdiction over hospital and blood bank associations by considering whether they were organized to carry on "business for profit within the traditional meaning of that language."<sup>3/</sup> In the court's view, merely engaging in some business activities does not bring an association within the jurisdiction of the Commission.<sup>4/</sup> A decade later, in a case involving the

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<sup>3/</sup> *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1018 (8<sup>th</sup> Cir. 1969).

<sup>4/</sup> *Id.* at 1019.

American Medical Association ("AMA"),<sup>5/</sup> the Second Circuit applied a very different test – a test articulated in the Commission's opinion that bases a finding of jurisdiction on an examination of the association's activities to determine whether it "provides tangible, pecuniary benefits to its members."<sup>6/</sup> In the matter now before the Court, the Ninth Circuit adopted the *AMA* "tangible pecuniary benefits" test.

This important jurisdictional issue has been before this Court only once since enactment of the FTC Act in 1914<sup>7/</sup> – in 1982 in the *AMA* case. Because the Court did not issue an opinion in that case questions remain unresolved, to the detriment of the affected professional associations and the public they serve. The "tangible pecuniary benefits" test is so broad and nonspecific that it lends itself to interpretations that effectively nullify the statutory limitation for nonprofit associations. While the *Community Blood Bank* standard is truer to the statutory language, to some extent it too leaves open

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<sup>5/</sup> *American Medical Ass'n ("AMA") v. FTC*, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided court, 455 U.S. 676 (1982).

<sup>6/</sup> *AMA v. FTC*, 94 F.T.C. 701, 785 (1979).

<sup>7/</sup> Section 4 defines "corporation" as

any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.  
38 Stat. 717, 719.

to question the kinds of activities that might bring a nonprofit association within the jurisdiction of the FTC.

Resolution of the conflict and the articulation of a single, clear standard for the FTC to follow are urgently needed. The Commission has made the investigation of nonprofit professional associations a high priority in recent years. In the absence of a test defining the boundaries of its jurisdiction in a workable and predictable way, the FTC has strayed from the clear meaning of the statute. Today, the Commission's enforcement policies simply cannot be reconciled with the plain language of Section 4.

## II. THE PECUNIARY BENEFIT TEST IS INCONSISTENT WITH THE NARROW BASIS FOR JURISDICTION OVER NONPROFIT ASSOCIATIONS DEFINED IN SECTION 4 OF THE FTC ACT

Section 4 of the FTC Act limits the agency's jurisdiction to entities "organized to carry on business for [their] own profit or that of [their] members." 15 U.S.C. § 44. On its face this language excludes nonprofit professional societies and nothing in the legislative history of the FTC Act indicates than Congress intended otherwise. Section 4 reflects Congress' intent to give the Commission jurisdiction only over for-profit, commercial organizations that meet the definition of being organized to carry on business for their own or their members' profit.

The Commission took an expansive view of its statutory authority in *Community Blood Bank*, but the Eighth Circuit reversed, interpreting the language of the FTC Act clearly and literally. Commission jurisdiction, the court found, must depend upon a determination of whether the organization

"engages in business for profit within the traditional meaning of that language."<sup>8/</sup> Drawing an analogy to a "religious association [that] might sell cookies at a church bazaar,"<sup>9/</sup> the court recognized that marketing activities such as selling blood for profit are "of no relevance" to the question of FTC jurisdiction as long as any income gained is devoted to the nonprofit purposes of the organization.<sup>10/</sup> In reversing the FTC's finding of jurisdiction, the court quoted Commissioner Elman's "cogent" dissent, in which he described the "clear import of the Commission's holding . . . [as reading] Section 4 out of the Act altogether and hold[ing] . . . that its jurisdiction under the Act embraces *all* corporations, profit and nonprofit alike, whatever the circumstances."<sup>11/</sup>

Faced with the *Community Blood Bank* opinion, the Commission's analysis in the AMA case, as expressed in its brief to the Second Circuit, included both an acknowledgment of the limitations Section 4 imposes on its jurisdiction over nonprofit associations and recognition of the approach taken by the Eighth Circuit in *Community Blood Bank*.<sup>12/</sup> The FTC's analysis then went on to describe "a spectrum of association activities ranging from the purely eleemosynary to the purely

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<sup>8/</sup> *Community Blood Bank* at 1018.

<sup>9/</sup> *Id.*

<sup>10/</sup> *Id.*

<sup>11/</sup> *Id.*

<sup>12/</sup> Respondent's Brief at 34 - 36, *AMA v. FTC*.

commercial”<sup>13</sup> that it would examine in deciding the jurisdictional issue. The Commission put charitable, cultural, educational and scientific activities into a category of “non-entrepreneurial” functions which are outside its jurisdiction.<sup>14</sup> The Commission’s brief further defined this nonprofit category when it concluded that the AMA’s activities devoted “to the advancement of medical science, education and public health, and . . . [its] scientific activities”<sup>15</sup> were not profit-promoting. As to all of these activities, the FTC’s position before the court was that they could not be counted in determining whether the association engaged in more than incidental commercial activity.

Turning to the commercial end of the spectrum of association activities, and recognizing, as the Eighth Circuit had in *Community Blood Bank*, that every association engages in some business activities, the FTC gave further assurances against jurisdictional overreaching when it told the *AMA* court in its brief that when a nonprofit association “serves both the profit-oriented entrepreneurial interests of its members and their non-entrepreneurial interests [the association] is within the scope of Section 4 [but only] with respect to its profit promoting aspects”<sup>16</sup> and only when the profit oriented

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<sup>13/</sup> *Id.* at 32.

<sup>14/</sup> *Id.*

<sup>15/</sup> *Id.* at 38.

<sup>16/</sup> *Id.* at 32. At oral argument before this Court in the *AMA* case, the FTC confirmed this jurisdictional analysis when it said, “the Commission does not claim broad jurisdiction over nonprofit associations. It claims jurisdiction over nonprofit associations made up of entrepreneurs when

activities are substantial: “The commercial part of the spectrum is subject to the FTC Act but that part must be a substantial, not incidental, portion of the whole.”<sup>17</sup>

While it acknowledged the jurisdictional constraints the Eighth Circuit had defined in *Community Blood Bank*, the Commission advocated, and the Second Circuit adopted, a very different test for jurisdiction, and that test represents a significant departure from the clear meaning of Section 4 that formed the basis for the *Community Blood Bank* holding. Both the FTC and the Second Circuit based their findings that the AMA fell within the scope of Section 4 on certain activities that conferred, not profits, but “pecuniary benefits” on the association’s members. Among the activities cited in both opinions as profit-promoting were lobbying for legislation that “may be for the profit of its members . . . [and] render[ing] business advice to its members.”<sup>18</sup>

Although the *AMA* “pecuniary benefit” test was accompanied by multiple references to the nonprofit jurisdictional limitation, in practical effect, substitution of the “pecuniary benefits” analysis for the Eighth Circuit’s straightforward standard based on the language of Section 4 (whether the organization “engages in business for profit within the traditional meaning of that language”) permits the Commission to engage in exactly the kind of jurisdictional

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those associations are engaged in substantial part in operating for the profit of those entrepreneur members.” Record at 38-39, *AMA v. FTC* (No. 80-1690).

<sup>17/</sup> *Id.* (emphasis added).

<sup>18/</sup> *AMA v. FTC*, 638 F.2d at 447-48.

overreaching that the Eighth Circuit overruled in *Community Blood Bank*. It also complicates the process of determining which, if any, professional associations fall within the FTC's jurisdiction by requiring an examination of each and every "activity" an association engages in.<sup>19/</sup> Precisely what should count as eleemosynary activities and what should count as profit-making has remained at the heart of the controversy that came to this Court in the AMA case sixteen years ago. The issue was evident in the exchange between this Court and counsel for the AMA:

MR. MINOW: Would you believe that it was contended here that our continuing education programs are for the profit of our members, because if you learn something there, you'll get more patients. That's silly  
....

QUESTION: Is the cost of attending those programs deductible for income tax purposes?

MR. MINOW: I would think so, Justice Stevens.

QUESTION: Because they produce income.

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<sup>19/</sup> By comparison, the Eighth Circuit in *Community Blood Bank* found that marketing activities and profit making are "of no relevance" to the issue of whether the FTC has jurisdiction as long as any income is devoted to the nonprofit purposes of the organization. (*Community Blood Bank* at 1018.)

MR. MINOW: I would think so, but I don't think that has anything to do with whether the AMA or the Connecticut Medical Society or the New Haven Medical Society were organized for the purpose of producing profit for their members. That's a different question.

QUESTION: I suppose, Mr. Minow, that if it is deductible, and I would assume that it is, it's on the same basis that a schoolteacher taking summer courses can deduct summer courses at the university.

MR. MINOW: To advance your skills or advance your - right. I would think so, Mr. Chief Justice.

QUESTION: But that isn't probably profit making except that it's profitable for the teacher in the long run, but we would hope for the public too.<sup>20/</sup>

Sixteen years of experience have not answered these questions. The case now before the Court demonstrates the need to do so. In affirming the Commission's finding of jurisdiction, the Ninth Circuit in this case reverts to the approach taken by the Commission and overruled by the Eighth Circuit in *Community Blood Bank* and thereby effectively nullifies the jurisdictional exemption Congress wrote into Section 4 of the FTC Act.

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<sup>20/</sup> Record at 14-16, *AMA v. FTC* (No. 80-1690).

In its brief to the Ninth Circuit in this case, the Commission acknowledged the statutory limitation on its jurisdiction and described that limit by stating, as it had in *AMA*, that it has jurisdiction over a nonprofit association if the association provides "economic" or "pecuniary" benefits and those "benefits are a 'substantial part of' its total activities."<sup>21/</sup> But, as in *AMA*, despite an expressed recognition of the nonprofit exemption, the Commission's analysis led it to identify, a very broad range of "pecuniary benefits" -- including lobbying and litigation affecting members' businesses, insurance plans and practice management advice<sup>22/</sup> -- which led to the conclusion that CDA was within its jurisdiction.

In affirming the FTC's jurisdictional finding, the Ninth Circuit began its analysis by agreeing with the Eighth Circuit that the FTC's authority "turns on whether [the association] is organized to carry on business for its own profit or that of its members"<sup>23/</sup> Unlike the *AMA* court, however, the Ninth Circuit explicitly departed from the Eighth Circuit's reliance on the traditional meaning of the statutory language set out in *Community Blood Bank*. The court decided instead to apply what it described as the more "expansive view of 'profit'"<sup>24/</sup> adopted by the Second Circuit in *AMA* -- "tangible pecuniary benefits" to CDA members.

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<sup>21/</sup> Respondent's Brief at 25, *California Dental Ass'n ("CDA") v. FTC*.

<sup>22/</sup> *Id.* at 24.

<sup>23/</sup> *CDA v. FTC*, 128 F.3d 720, 725 (9<sup>th</sup> Cir. 1997).

<sup>24/</sup> *Id.* at 726.

Among the activities found by the Ninth Circuit to constitute "tangible pecuniary benefits," were lobbying for insurance and Medicare reform, the regulation of members' advertising and solicitation, and providing continuing education. The court specifically encompassed in its analysis of activities that could be counted as justifying FTC jurisdiction, those that might "indirectly make members' practices more efficient and reduce their costs."<sup>25/</sup>

If the FTC and the courts continue to use the "pecuniary benefit" test, and if all the activities enumerated in the *AMA* and CDA cases can support FTC jurisdiction over nonprofit associations, then there is no longer any meaningful limit to that jurisdiction.

### III. THE COMMUNITY BLOOD BANK TEST IS A PROPER INTERPRETATION OF SECTION 4

In *Community Blood Bank*, the Eighth Circuit specifically rejected the notion that a nonprofit association becomes a profit-making entity under Section 4 simply by engaging in some activities that a commercial enterprise engages in -- e.g., by operating in a businesslike manner that benefits its members, by receiving income from securities, or by making a profit. So long as nonprofit entities are "validly organized and existing under nonprofit corporation statutes . . . [and] do not distribute any part of their funds to and are not organized for the profit of members or shareholders" then they remain beyond the reach of the FTC.<sup>26/</sup> Even if the value of an association's activities

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<sup>25/</sup> *Id.*

<sup>26/</sup> *Community Blood Bank* at 1019.

explains why members are willing to pay for membership, under the *Community Blood Bank* standard the association is not subject to the jurisdiction of the FTC.

The Ninth Circuit's adoption in this case of the *AMA* "pecuniary benefits" analysis only confirms the wisdom of the *Community Blood Bank* test. While the FTC has long acknowledged that an association's educational efforts should remain outside the agency's jurisdiction,<sup>27/</sup> the Ninth Circuit now lists continuing education of the members as one of the apparent bases for jurisdiction over the association.<sup>28/</sup> Similarly, although an association's effort to preserve the integrity of the profession by the legitimate regulation of its members' advertising is a laudable nonprofit objective, the Ninth Circuit cites such activity as evidence of the commercial nature of the CDA.<sup>29/</sup> Moreover, both the Ninth and Second Circuits regard the exercise of a First Amendment right to petition a government body (i.e., lobbying for regulatory reform) as evidence that the nonprofit association has turned to the business of operating for the profit of its members.<sup>30/</sup> Thus, in two circuits, any association that enhances the state of the science it studies, preserves the ethics its members observe, improves the quality of the care they provide, or advises regulators of the benefits and costs of public policies thereby risks subjecting itself to the jurisdiction of the Federal Trade

Commission. This is not the law in the Eighth Circuit. More importantly, this cannot be what Congress intended when it prohibited the Commission from asserting authority over nonprofit associations.

#### IV. FAILURE TO OBSERVE THE CONSTRAINTS OF SECTION 4 WILL TEMPT THE COMMISSION TO BECOME A FEDERAL REGULATOR OF THE QUALITY OF CARE

After this Court divided on the Second Circuit's decision in *AMA*, the Association took its case to Congress and proposed legislation that would have diminished the FTC's authority by exempting state-licensed professionals from its jurisdiction altogether. Before Congress was the question whether the FTC was impermissibly intruding into the regulation of the services performed by professionals -- so-called "quality of care" issues traditionally regulated by the states. Responding to this jurisdictional threat, the FTC Chairman assured the Senate leadership that while the Commission had, over the years, examined certain practices of certain professionals and their organizations, the agency's activities did not

derive from any desire to regulate the professions. . . . Our objective, in both our competition and our consumer protection activities, is to enhance the ability of informed consumers to act as ultimate regulators of the market. . . . The Commission's activities in this area have not sought to interfere either with legitimate self-regulation or with the authority of the

<sup>27/</sup> See, e.g., the Commission's brief to the Second Circuit in *AMA*, *supra* n. 13.

<sup>28/</sup> CDA at 726.

<sup>29/</sup> *Id.*

<sup>30/</sup> CDA at 726; *AMA* at 448.

states to assure the quality of services to their citizens."<sup>31/</sup>

A later letter from Chairman Miller to Senator Packwood confirmed that the FTC's interest in regulating professionals had historically extended only to "business practices" as distinguished from quality of care issues or "scope" of practice.<sup>32/</sup> In sum, Chairman Miller characterized the limitations on the FTC's regulation of professionals by emphasizing that the FTC's regulatory efforts are aimed only at the business activities of business establishments, not the regulated practices of members of nonprofit professional associations. With these representations, Congress defeated the AMA's proposed exemption.

Today, assuring the quality of medical services to patients in the U.S. remains the responsibility of the states. This authority is typically exercised by state medical boards, whose primary responsibility is "to protect the public from the incompetent, unprofessional, improper, and unlawful practice of medicine, [and it] is determined by each state's medical practice act."<sup>33/</sup> In 1995, the Federation of State Medical Boards of the United States, citing concern that recent legislative

initiatives could restrict the ability of individual medical boards to regulate questionable health care practices, established a committee to develop recommendations to assist boards in "evaluating, investigating, and prosecuting physicians engaged in such practices."<sup>34/</sup> The committee has reported its recommendations, and principal among them is the conclusion that collaboration between state medical boards and the FTC would be an effective way to "stop the spread of questionable health care practices."<sup>35/</sup> Specifically, the committee recommended that boards expand their liaison with the FTC in order to identify physicians who may be engaging in questionable health care practices,<sup>36/</sup> use the FTC as a source of information in their evaluation of such practices,<sup>37/</sup> and coordinate with the FTC on avenues of potential prosecution against targeted physicians.<sup>38/</sup>

Prosecuting questionable health care practices or assisting state boards in their physician prosecutions is precisely contrary to the representations the Commission made to Congress during the AMA debates. But in light of recent actions of the Commission, it is all too conceivable that the agency could heed the call to join forces with medical practice regulators who appreciate the investigative, prosecutorial, and remedial powers of the Commission. Already, the agency has

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<sup>31/</sup> Letter from FTC Chairman James C. Miller, III to Honorable Bob Packwood, Chairman, Senate Comm. on Commerce, Science and Transportation and Honorable Bob Kasten, Chairman, Subcomm. on Consumer Protection (March 11, 1982).

<sup>32/</sup> Letter from Chairman Miller to Honorable Bob Packwood (May 27, 1982).

<sup>33/</sup> Federation of State Medical Boards of the United States, Report of the Special Committee on Health Care Fraud at I-40 (April 1997).

<sup>34/</sup> *Id.*

<sup>35/</sup> *Id.* at I-50.

<sup>36/</sup> *Id.* at I-42.

<sup>37/</sup> *Id.* at I-44.

<sup>38/</sup> *Id.* at I-46-47.

begun to take positions on the merits of certain medical therapies and to communicate its views directly to doctors. In the area of eye surgery, the Commission joined in the Food and Drug Administration's warning to doctors about the appropriate standards that govern claims for medical procedures they might use.<sup>39</sup> In an advisory recently issued by the FTC on its website, the Commission also warns the public about the limitations of laser ocular surgery and invites consumers to contact the agency with questions or information concerning questionable practices. These activities are difficult to distinguish from the evaluation and regulation of medical procedures -- the very area in which the FTC has repeatedly denied it has jurisdiction or regulatory interest. Of particular concern to ACAM is that if the agency intends to regulate medical practices, it can easily assert that its jurisdiction reaches associations that educate physicians or the public about those practices.

#### V. THE COURT SHOULD GRANT THE PETITION AND CLARIFY THE DISTINCTION BETWEEN NONPROFIT ACTIVITIES AND PROFIT-MAKING BUSINESS UNDER SECTION 4

The distinction between profit-making activities and non-profit services has grown increasingly difficult to draw in the context of professional associations. If the Commission can declare associations to be generating pecuniary benefits by providing continuing education to their members, then this

federal agency can decide whether an association's instructors have properly substantiated and qualified their medical lectures. If the Commission can second-guess the decisions of an association that advises the public about therapies or regulates the claims of its members, then the agency can determine what the public learns about available care and how doctors communicate with their patients. If the Commission can assert jurisdiction over associations that educate regulators about the impact of public policy, then the agency can alter the course of state regulation of the professions. Fifteen years ago, AMA voiced concerns such as these to Congress and the courts. What once may have been warnings of remote danger now must be considered alarms of imminent risk. Only by clarifying the Commission's jurisdiction over professional associations can this Court allay those concerns.

Pecuniary benefits cannot serve as useful characteristics to distinguish profit making from public service. Continuing medical education, maintaining ethical standards and regulating the quality of care should remain the concern of the states and the professions they regulate. Professional associations that facilitate these processes are providing public services -- which also are of pecuniary value to their members. A better educated doctor or dentist may indeed be more efficient and therefore more profitable. A more ethical advertiser may be more valuable to society, and in the long run, more profitable for the practice of medicine. Efforts to inform public policy may redound to the pecuniary benefit of doctors and dentists, as well as their patients. Consequently, associations that advance these goals on behalf of their members may provide services that members would gladly pay for. Such associations, however, were not the concern of Congress in 1914, and they should not

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<sup>39/</sup> Letter on PRK promotion and advertising from Lillian J. Gill, Director, Office of Compliance, Center for Devices and Radiological Health, FDA and Dean C. Graybill, Associate Director, Division of Service Industry Practices, Bureau of Consumer Protection, FTC to Eye Care Professionals (May 7, 1996).

be the concern of the FTC today. The Circuit Courts, however, cannot agree.

ACAM urges the Court to grant the petition of the California Dental Association, and to apply and clarify the test that *Community Blood Bank* announced when the Commission first sought judicial recognition of "pecuniary benefits" as a means to circumvent the intended limitations of Section 4. The conflict in the circuits has allowed the Commission to put nonprofit associations on a par with commercial public corporations. Until the agency is ordered to follow a clarified version of *Community Blood Bank* it could threaten prosecution of and bring cases that Congress never intended it to undertake.

### **CONCLUSION**

For these reasons, the petition for certiorari in this case should be granted.

Respectfully submitted,

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18  
Supreme Court, U.S.  
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NOV 10 1998  
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No. 97-1625

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1998

CALIFORNIA DENTAL ASSOCIATION,  
PETITIONER,  
v.  
FEDERAL TRADE COMMISSION,  
RESPONDENT.

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 3, 1998  
CERTIORARI GRANTED SEPTEMBER 29, 1998

45PP

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## NOTICE

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UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of )  
CALIFORNIA DENTAL )  
ASSOCIATION, )  
a corporation. )  
\_\_\_\_\_  
Docket No. D-9259

## DOCKET ENTRIES

<u>CODE</u>	<u>DESCRIPTION</u>	<u>DATE FILED</u>
1901 0001	<p>***</p> <p>Pt3 matter opened for adjud</p> <p><u>Commission Vote:</u></p> <p>Comm. Steiger Yes</p> <p>Comm. Azcuenaga Yes</p> <p>Comm. Owen Yes</p> <p>Comm. Starek Yes</p> <p>Comm. Yao Yes</p> <p><u>IRIS Doc. Info.:</u> No. B141832</p> <p>Title: Administrative complaint issued on July 9, 1993 in the matter of California Dental Association.</p> <p>Abstract: Binder D09259-1-1; 2-12</p> <p>***</p>	07/09/93
2802 0009	<p>Ans to complaint file</p> <p><u>IRIS Doc. Info.:</u> No. B144648</p> <p>Title: Answer of respondent California Dental Association.</p> <p>Abstract: Binder DO9259-1-1; 22-38</p> <p>***</p>	09/02/93

<u>CODE</u>	<u>DESCRIPTION</u>	<u>DATE FILED</u>
3210 0236	<p>ID file  <u>IRIS Doc. Info.:</u> No. B174689          Title: Administrative Law          Judge's Initial Decision in the matter of California Dental Association.          Abstract: Binder D09259-1-8; 4058-4158</p> <p>***</p>	07/17/95
3950 0257	<p>Comm act re FO/D&amp;O - NSC  <u>Commission Vote:</u>          Comm. Pitofsky Yes          Comm. Azcuenaga No          Comm. Steiger Yes          Comm. Starek Yes          Comm. Varney Yes  <u>IRIS Doc. Info.:</u> No. B191356          Title: Final Order and Opinion with Statements by Commissioners Azcuenaga and Starek in the matter of California Dental Association.          Abstract: Binder D09259-1-9; 4819-4927</p> <p>***</p>	03/25/96

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CALIFORNIA DENTAL ASSOCIATION ) No. 96-70409  
Petitioner, ) FTC Docket No. 9259  
v. )  
FEDERAL TRADE COMMISSION )  
Respondent. )

DOCKET ENTRIES

<u>DATE FILED</u>	<u>DESCRIPTION</u>
5/21/96	<p>***</p> <p>FILED PETITION FOR REVIEW; DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL; NOTIFIED RESPONDENT OF FILING. Setting schedule as follows: petitioner's opening brief is due 8/12/96; respondent's brief is due 9/11/96; petitioner's optional reply brief is due 9/25/96. [96-70409] (ogm)</p> <p>***</p>
10/22/97	<p>FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Enforced; Written, Signed, Published. Herbert Y. CHOY; Cynthia H. HALL, author; Manuel L. Real, dissenting.)</p>

DATE FILED    DESCRIPTION

FILED AND ENTERED  
JUDGMENT. [96-70409]  
12/15/97 (vt)

12/8/97    Filed original and 49 copies  
Petitioner California Dental  
petition for rehearing with  
suggestion for rehearing en  
banc. 15 p.pages, served on  
12/4/97 PANEL & ALL  
ACTIVE JUDGES (vt)

1/28/98    Filed order (Herbert Y.  
CHOY, Cynthia H. HALL,  
Manuel L. Real,): The  
petitioner for rehearing is  
DENIED and the suggestion  
for rehearing en banc is  
REJECTED. [96-70409] (vt)

\*\*\*

8510161  
B141832

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

CALIFORNIA DENTAL  
ASSOCIATION,  
a corporation.

Docket No. D-9259

COMPLAINT

Pursuant to the provisions of the Federal Trade  
Commission Act, 15 U.S.C. § 41 *et seq.*, and by virtue of the  
authority vested in it by said Act, the Federal Trade  
Commission, having reason to believe that the California  
Dental Association, a corporation, has violated and is  
violating the provisions of Section 5 of the Federal Trade  
Commission Act, and it appearing to the Commission that a  
proceeding by it in respect thereof would be in the public  
interest, hereby issues its complaint, stating its charges in  
that respect as follows:

PARAGRAPH ONE: Respondent California Dental  
Association ("CDA" or "respondent") is a corporation  
organized, existing and doing business under and by virtue  
of the laws of the State of California. Its principal office and  
place of business is located at 818 "K" Street Mall (Post  
Office Box 13749), Sacramento, California 95853.

PARAGRAPH TWO: CDA is a professional  
association organized in substantial part to represent the  
interests of its dentist members. CDA has approximately  
15,000 dentist members, constituting approximately 75% of

the practicing dentists in California. CDA is engaged in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, CDA is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

**PARAGRAPH THREE:** CDA has 32 local component dental societies. Dentists are required to be members of the CDA component within whose jurisdiction they practice in order to be eligible for membership in CDA. CDA's activities, including those complained of, are directed by its House of Delegates, which is composed of delegates from CDA's component societies. CDA is a constituent society of the American Dental Association ("ADA"). To be eligible for membership in ADA, a dentist practicing in California must be a member of CDA.

**PARAGRAPH FOUR:** Most CDA members are engaged in the business of providing dental services for a fee. Except to the extent that competition has been restrained as herein alleged, and depending upon their specialties and geographic location, CDA's members have been and are now in competition among themselves and with other dentists.

**PARAGRAPH FIVE:** The acts and practices of CDA, including the acts and practices alleged herein, have been, or are, in or affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

**PARAGRAPH SIX:** In selecting a dentist, consumers generally consider factors of price and quality of service, including the dentist's training and experience, modes of treatment, areas of concentration or special interest, and the efficiency and convenience of the dental office. Truthful, nondeceptive advertising enables dentists to inform consumers about the price and quality factors of their

services and about how their practices differ from other dentists, and thereby benefits consumers and promotes competition among dentists. For example, through advertising dentists can inform consumers of the location and nature of their practices and that they offer special discounts, such as for senior citizens. Such advertising can provide an incentive for dentists to offer services and prices desirable to consumers.

**PARAGRAPH SEVEN:** CDA has restrained competition among dentists in California by acting as a combination of its members, or by conspiring with at least some of its members and its component societies to restrict unreasonably the dissemination of information to consumers. In particular, CDA has combined or conspired to restrict the ability of dentists to engage in a wide variety of forms of advertising without regard to whether the advertising is truthful and nondeceptive, including:

- A. Advertising price information such as discounted fees;
- B. Advertising relating to the quality of dentists' services, including statements that inform consumers that the dentist takes special steps to address consumers' fears about dental treatment; offers treatments not available from other dentists in the area; or has a practice that in some other respects is different from the practices of other dentists in the community; and
- C. Advertising that uses methods that may be particularly effective in conveying information to consumers.

PARAGRAPH EIGHT: CDA has engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

- A. Adopting, publishing, and maintaining rules that require dentists to refrain from a variety of forms of advertising without regard to whether the advertising is truthful and nondeceptive;
- B. Coercing members who violate its advertising rules into ceasing such advertising;
- C. Expelling members who refuse to refrain from engaging in such advertising;
- D. Refusing to grant membership to any dentist who engages in such advertising; and
- E. Attempting to coerce non-members to comply with its rules, by, among other things, denying membership to, or cancelling the membership of, dentists whose non-CDA member employers advertise in a manner not acceptable to CDA.

PARAGRAPH NINE: CDA's acts and practices have harmed consumers by restricting or preventing dentists from truthfully and nondeceptively informing the public of the price, quality and availability of their services and how their practices differ from those of other dentists. Among other things:

- A. CDA restricts certain categories of price advertising without regard to whether such advertising is truthful and nondeceptive. For example,

- 1. CDA prohibits all announcements of across-the-board discount offers, such as "SENIOR CITIZEN DISCOUNT" and \$25-off coupons for new patients.
- 2. CDA prohibits statements relating to low prices, such as "CARE AT REASONABLE PRICES," that can serve to signal a dentist's sensitivity to consumers' concerns about prices.
- B. CDA restricts representations that relate to the quality of dental services without regard to whether the representations are truthful and nondeceptive. For example,
  - 1. CDA bans a wide variety of advertising that it deems to constitute claims of "quality" or "superiority" without regard to whether such advertising is truthful and nondeceptive. CDA also prohibits quality claims through its bans on the use in advertising of adjectives, superlatives and subjective representations.
  - 2. CDA has stopped dentists from using phrases in advertising such as "SPECIAL TREATMENT FOR NERVOUS PATIENTS," and "SPECIAL CARE FOR COWARDS", and thus has restricted claims that can inform the public that the dentist pays particular attention to consumers' fears and anxieties regarding dental procedures, and that the dentist takes

special care to relieve those fears and anxieties.

- C. CDA restricts certain methods of advertising without regard to whether the advertising claims are truthful and nondeceptive. For example,
  - 1. CDA in effect discourages free dental screenings of schoolchildren by preventing dentists who provide such screenings from using their professional forms, which are imprinted with their names and addresses, in reporting the results of the screening.
  - 2. CDA restricts the ability of dentists to attract patients and convey information to them about the dentists' practices by, for example, prohibiting dentists from hiring an agent to pass out coupons in front of the building in which a dentist practices, and from distributing business cards or other materials promoting the dentist's practice.
  - 3. CDA prohibits dentists from advertising in any manner other than that which "contributes to the esteem of the public." Such a prohibition restricts dentists from using advertising techniques that may be particularly effective at gaining attention and conveying information to consumers.
  - 4. CDA bans the advertising of 'guarantees' of dental services without regard to whether the advertisement is truthful and nondeceptive.

**PARAGRAPH TEN:** In some of its activities that restrict truthful, nondeceptive advertising for dental services, CDA purports to "enforce" state statutes and regulations pertaining to advertising and solicitation. CDA, however, imposes on the market its own restrictive position on advertising regulation in situations where the state's policy is either unclear or is contrary to CDA's position. CDA is not an agent of the State and has not been authorized to interpret or enforce state laws on behalf of the State.

**PARAGRAPH ELEVEN:** CDA's actions described in Paragraphs SEVEN, EIGHT and NINE have had, or have, the tendency and capacity to restrain competition unreasonably and to injure consumers in the following ways, among others:

- A. Consumers of dental services have been deprived of the benefits of price and quality competition;
- B. Consumers of dental services have been deprived of truthful, nondeceptive information for use in their selection of a dentist;
- C. The costs to consumers of finding dental services at their desired cost and quality have been raised; and
- D. Innovation in the delivery of dental services has been, or likely has been, hindered or restrained.

**PARAGRAPH TWELVE:** The combination or conspiracy and the acts and practices described in Paragraphs SEVEN, EIGHT, and NINE constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. CDA's combination or conspiracy, or the effects thereof, is continuing and will continue or recur in the absence of the relief herein requested.

## NOTICE

Notice is hereby given to the respondent named above that the 13<sup>th</sup> day of September A.D., 1993, at 10:00 a.m. o'clock is hereby fixed as the time and Federal Trade Commission Offices, Sixth Street and Pennsylvania Avenue, Northwest, Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30<sup>th</sup>) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint, or if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to appeal the initial decision to the Commission under § 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in an adjudicative proceeding in this matter that the respondent is in violation of Section 5 of the Federal Trade Commission Act, as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Ordering respondent California Dental Association ("CDA") to cease and desist from prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against:
  - (a) truthful, nondeceptive advertising or publishing by any person of the prices, terms or conditions of sale of dentists' services, or of information about dentists' services, facilities or equipment which are offered for sale or made available by dentists or by any organization with which dentists are affiliated; and
  - (b) truthful, nondeceptive solicitation of patients, patronage, or contracts to supply dentists' services by any dentist or by any organization with which dentists are affiliated, through advertising or by any other means;

Provided that, nothing in this Order shall prohibit the respondent from encouraging its members to obey state law or from disciplining any member as a result of that member's reprimand,

discipline, or sentence by any court or any state authority of competent jurisdiction.

2. Ordering respondent to notify its members of the existence and terms of this Order;
3. Ordering respondent to contact dentists who within the last ten years have been expelled from or denied membership in respondent because of advertising practices and invite them to re-apply for membership;
4. Ordering respondent to disaffiliate any of its component societies that engage in conduct that if engaged in by respondent would violate the order;
5. Ordering respondent to file periodic compliance reports with the Commission; and
6. Ordering any other provisions appropriate to remedy the effects of, or prevent the recurrence of, the anticompetitive practices engaged in by respondent.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 9<sup>th</sup> day of July, 1993.

By the Commission.

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Benjamin I. Berman  
Acting Secretary

SEAL

## ASSETS

### CDA BUILDING

The new headquarters, equipped with state-of-the-art word processors and a laser printer, sophisticated computers and five conference rooms (one with a seating capacity of over 100 persons), is a landmark that represents the tangible presence of organized dentistry in the state.

Purchasing the 60,000 square foot, six-level building has freed CDA from the drawbacks inherent in renting space. And, it has provided the association with a sound financial investment for many years to come.

[PICTURE OMITTED]

The new Sacramento headquarters marks the growth and influence of organized dentistry's voice in the State Capitol.

### FOR-PROFIT SUBSIDIARIES

Sharing the facility with CDA are its wholly-owned subsidiaries The Dentists' Company (TDC), The Dentists' Company Insurance Services (TDCIS), The Dentists' Company Data Management (TDCCM) and The Dentists Insurance Company (TDIC).

The TDC was formed to provide a wide range of services to CDA members while contributing needed dollars to association activities. After only one year of operation, this company has already begun to generate significant income and benefits for members.

TDC this year introduced a new office consultation program—Practice Plus—which has received unanimous praise from its clients. This comprehensive service includes

three visits by consultants to the dental practice to analyze doctor-patient communications, the practice's marketability, business office efficiencies, personnel relations and patient satisfaction. The service is available to members only on a first-come, first-served basis.

TDC also launched a new printing services department for members. For the first time, members can purchase business cards, stationery, "superbills," appointment cards, Rx blanks and other office supplies at prices 25-40% less than they would pay elsewhere.

TDCIS this year provided personal and office insurance protection to nearly 30,000 CDA members, their families and staff. Net income for this fiscal year was \$157,000. By fiscal year 1987-88, net income is expected to reach \$750,000.

Another significant growth area is TDCCM's turnkey computer system. TDCCM recently joined forces with a highly respected computer company to provide dentists with a full-service computer system for the office. The system, designed for and by dentists to meet the special demands of the profession, promises to be the industry standard for dentists.

TDIC, the association's other wholly-owned subsidiary, continues to bring stability to a market where none existed. Founded by CDA in 1980, TDIC now protects over 9,500 members from the risks of astronomical awards from the courts and an escalation of malpractice claims.

### **FINANCIAL EXPENDITURES**

Where do our dues go? By far the largest expenditure goes toward the services described in this report. This chart illustrates the total financial expenditure and how it was allocated for fiscal year 1983-84.

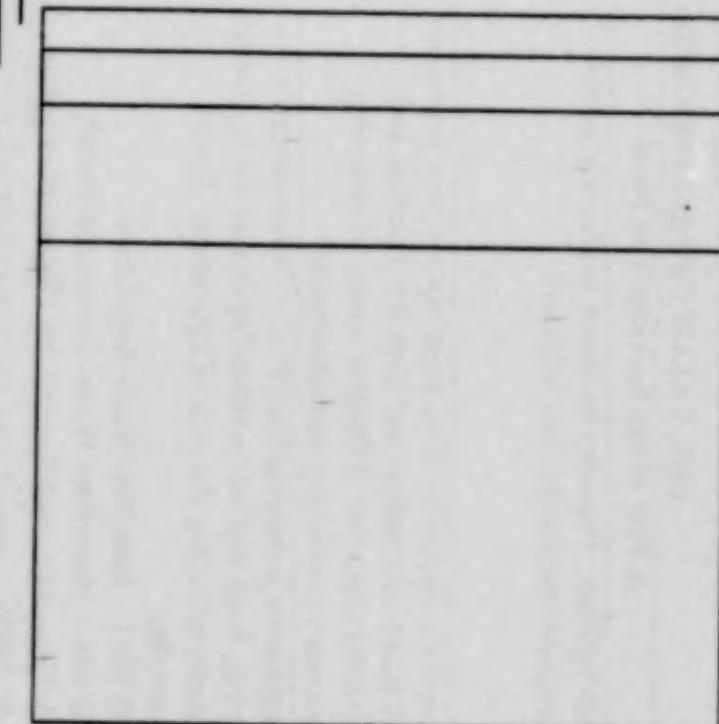
<b>Total</b>	
<b>Financial</b>	
<b>Expenditures</b>	<b>\$5,613,026</b>

Direct Member Services	65%
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Association Administration & Indirect Member Services	20%
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Membership Maintenance	8%
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Services to the Public	7%
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**THE VALUE OF MEMBERSHIP: CAN YOU AFFORD NOT TO BELONG?**

<b>A Few of the Services You Need</b>	<b>Value to Member</b>
Peer Review: Provides an easier, less costly patient complaint resolution than litigation.	Avoidance of potentially costly, lengthy litigation: Probable Minimum Cost Per Incidence of litigation to either Liability Carrier or Individual Dentist .....\$10,000
Scientific Sessions: Two meetings per year presenting the latest information and tools for technical and business expertise. Effective means of obtaining necessary continuing education units.	BIDF approved CE courses: access to new technology and treatment modalities under one roof .....\$1,600
Legislative Lobbying/CalDPAC: Demonstrates a strong, large unified membership before the legislature thereby affecting the path of legislation. Recent examples.	Ongoing legislative effort resulting in reasonable laws which result in direct benefit to the practicing dentist. Without CDA lobbying efforts, costs to the practitioner would have been ..... \$1,200* ..... \$1,000** (Over a 30-year practice span, combined value = \$66,000)
AB 1641 – Infection Waste Regulation AB 646 – Hazardous Waste Generation Permit SB 934 – Informed Consent for Placement of Silver Amalgam	

Public Relations and Marketing IV. Radio and print marketing instills a positive image of CDA dentists in the minds of millions of Californians.	Annual cost for one small phone book ad alone can be .....\$1,000 - \$3,000 (TV, radio and <i>People</i> magazine are out of reach for the average dentist)
• Annual renewal fees and monthly disposal of sharps for ABA 646 and ABA 1641	
** Application fee for AB 646 - Hazardous Waste Generation Permit	DCA-0117980

A Few of the Services You Need	Value to Member
<b>CDA Journal and Update. Publications covering the state-of-the-art in dental technology and the general and legislative news needed by dentists.</b>	Up-to-date scientific information and news about association and legislative activities and programs. Savings to member is.....\$66.00
Professional Placement Service Generates lists of dentists providing or seeking associates, time-sharing, practices for sale and salaried positions.	Increased opportunities to pursue career and practice options. Cost for use of outside agency is usually 1 - 3 month salary base. Assuming \$15,000 average salary savings to member would be .....\$7,000
<b>CDA's OSHA/SB 198 Compliance: Manual, workshops and provided posters assist members with office compliance requirements. Provided at minimal cost compared to commercial marketplace.</b>	Through compliance, avoidance of costly federal, state and local fines and penalties.  For example, a Northern California dentist was recently fined .....\$40,000

<b>Professional Liability Insurance. Provides claims-made coverage and risk management services (TDIC).</b>	Ability of quality liability coverage at highly competitive rates with dividends paid to policyholders. Lowest rates available to new graduates. Most liberal retirement benefits available. Savings to TDIC insured per year based on territory and risk .....\$1,005 - \$1,261
Potential value to members who take advantage of services offered:	\$22,739 - \$65,127

For more information regarding the value of membership, please call 1-800-736-8702, extension 4240.

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ETHICS

## CDA Code of Ethics

*Adopted by the California Dental Association House of Delegates June 4-6, 1993*

With the adoption of the Principles of Ethics and Code of Professional Conduct of the American Dental Association, it became necessary for the Judicial Council to rewrite CDA's Code of Ethics. In so doing, the council took the opportunity to rearrange the Code into three significant groupings. In the revised version of the Code printed here, the association's most important statements regarding ethical conduct can be found in the beginning sections. Thus, the first group pertains to service to the public; the second discusses the promotion of a dental practice; and the third portion concerns daily ethical conduct in the dental office.

### PREAMBLE

The *Code of Ethics* of the California Dental Association consists of the principles stated herein.

The CDA Judicial Council may, from time to time, issue advisory opinions setting forth the council's interpretations of the principles set forth in this *Code*. Such advisory opinions are "advisory" only and are not binding interpretations and do not become a part of this *Code*, but they may be considered as persuasive by the trial body and any disciplinary proceedings under the CDA *Bylaws*.

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The association's *Code of Ethics*, although presented in the form of general guides, clearly suggests the conduct which a dentist is expected to follow in carrying out professional activities whether they be related to patients or to fellow practitioners.

Problems involving questions or ethics should be solved within the broad boundaries established in this *Code of Ethics* and within the meaning and interpretation of the *Code of Ethics* and *Bylaws* of the constituent and component societies. If a satisfactory decision cannot be reached, the question should be referred, on appeal, to the Council on Ethics, *Bylaws* and Judicial Affairs of the American Dental Association, as provided in Chapter XII of the *Bylaws* of the American Dental Association, and also in Chapter XI of the *Bylaws* of the California Dental Association.

Dentists should constantly remind themselves that the ethics of dental practice, the basic system for self-regulation of the dental profession, grow out of the obligations inherent in the practice of a profession. The dentist should reflect constantly upon the professional characteristics of the dental occupation, which are:

1. The provision of a service (usually personal) which is essential to the health and well-being of society.
2. The necessity of intensive education and training to qualify as component to provide the essential service.
3. The need for continuing education and training to maintain and improve professional knowledge and skills.

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**ETHICS**

4. The need for joining with professional colleagues in organized efforts to share new knowledge and new developments of professional practice.

5. Dedication to service rather than to gain or profit from service.

6. Leadership in the community, including all efforts leading to the improvement of the dental health of the public.

**SECTION 1. SERVICE TO THE PUBLIC**

Service to the public is the primary obligation of the dentist as a professional person.

The dentist's primary obligation of service to the public shall include the delivery of quality care, competently and timely, within the bounds of the clinical circumstances presented by the patient.

In their service to the public, dentists shall conduct themselves in such a manner as to maintain or elevate the esteem of the profession.

In serving the public, a dentist may exercise reasonable discretion in selecting patients for the dental practice. However, a dentist may not refuse to accept a patient into his/her practice or deny dental service to a patient solely because of the patient's race, creed or national origin.

Wherever "standards of care" or "quality services" are undefined by state or federal law, such standards or services shall be defined by the California Dental Association or such agency as designated by the association.

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It is unethical for a dentist to render, or cause to be rendered, substandard care.

It is unethical to mislead a patient or misrepresent in any material respect either directly or indirectly the skills, training, identity, services, or fees of the dentist who performs a procedure.

A dentist has the obligation to obtain the fully informed consent of a patient prior to the use of any identifiable artifacts (such as photographs, x-rays, study models, etc.) for any purpose other than treatment.

A dentist who submits any billing for services rendered or to be rendered which is fraudulent, deceitful, or misleading is engaged in unethical conduct.

**Advisory Opinion:**

1. Dentists shall not represent the care being rendered to their patients or the fees being charged for providing such care in a false or misleading manner.

A dentist who accepts a third party<sup>1</sup> payment under a copayment plan as payment in full without disclosing to the third party payer that the patient's payment portion will not be collected, is engaged in overbilling. The essence of this ethical impropriety is deception and misrepresentation; an overbilling dentist makes it appear to the third party<sup>1</sup> payer that the charge to the patient for the services rendered is higher than it actually is.

**SECTION 2. GOVERNMENT OF A PROFESSION**

Every profession receives from society the right and obligation to regulate itself, to determine and judge its own

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**ETHICS**

members. Such regulation is achieved largely through the influence of the professional societies, and dentists have the dual obligation of making themselves a part of professional society and of observing its rules of ethics.

Any member convicted of or pleading guilty to any felony or misdemeanor involving malpractice or unprofessional conduct (as defined by the Dental Practice Act or the California Dental Association) is in violation of the *Code of Ethics*, and may be disciplined by the association.

Any member who makes a statement in any document filed with the California Dental Association, its component societies, or the American Dental Association, which statement is fraudulent or false in a material respect, or which omits to disclose any material fact or matter, has engaged in unethical conduct. For the purpose of this section, the word "material" shall mean "not insubstantial" or "of significance" with respect to reasons for which the document is filed.

**SECTION 3. COOPERATION WITH DULY CONSTITUTED COMMITTEES**

It is the duty of the member to comply with the reasonable requests of a duly constituted committee, council or other body of the component society or of this association necessary or convenient to enable such a body to perform its functions and to abide by the decisions of such body. In the event a member is employed by another dentist, it shall be the duty of the member to provide satisfactory written assurance from the employer that the employed dentist will be able to meet this duty of compliance. Any violation of this duty constitutes unethical conduct.

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**ETHICS**
**SECTION 4. COURT ACTION AND ASSOCIATION DISCIPLINE**

Dentists who are members of the California Dental Association shall comply with the laws of the State of California relating to the practice of dentistry. Any dentists who shall be reprimanded, disciplined, or sentenced by final action of any court or other authority of competent jurisdiction, pursuant to the laws of the State of California governing the practice of dentistry, or who are found by final action of any court guilty of a crime reflecting unfavorably on dentists or the dental profession, shall thereby render themselves liable to discipline by the association.

**SECTION 5. UNPROFESSIONAL CONDUCT AND VIOLATION OF STATE LAW**

A member may be disciplined for unprofessional conduct as it is defined by the Dental Practice Act, and for violation of any law of the State of California relating to the practice of dentistry.

**SECTION 6. EDUCATION BEYOND THE USUAL LEVEL**

The right of dentists to professional status rests in the knowledge, skill and experience with which they serve their patients and society. Every dentist has the obligation to advance his/her knowledge and keep his/her skills freshened by continuing education throughout his/her professional life.

**SECTION 7. USE OF PROFESSIONAL TITLES AND DEGREES**

A dentist may only use the titles or degrees, Doctor, Dentist, DDS or DMD and any additional academic degrees

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**ETHICS**

earned in health service areas on cards, letterheads, announcements and advertisements. A dentist who has been certified by a national certifying board for one of the specialties approved by the American Dental Association may use the title "diplomate" in connection with that specialty on cards, letterheads and announcements.

If dentists use a title or degree in connection with the promotion of any dental or other commercial endeavor, such usage must not be false or misleading in any material respect.

**Advisory Opinion:**

1. A dentist using volunteer position titles and association and/or component society connected experience in any commercial endeavor may be making a representation which is false or misleading in a material respect. Such use of volunteer position titles and association and/or component society connected experience may be misleading because of the likelihood that it will suggest that the dentist using such is claiming superior skills. However, when such usage does not conflict with state law, volunteer position titles and association and/or component society connected experience may be indicated in scientific papers and curriculum vitae which are not used for any commercial endeavor. In any review by the council of the use of volunteer position titles and association and/or component society connected experience, the council will apply the standard of whether the use of such is false or misleading in a material respect.

**SECTION 8. ANNOUNCEMENT OF  
SPECIALIZATION AND LIMITATION OF  
PRACTICE**

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**ETHICS**

This section is designed to help the public make an informed selection between the practitioner who has completed an accredited program beyond the dental degree and a practitioner who has not completed such a program.

The special areas of dental practice approved by the American Dental Association and the designation for ethical specialty announcement and limitation of practice are: dental public health, endodontics, oral pathology, oral and maxillofacial surgery, orthodontics, pediatric dentistry, periodontics and prosthodontics.

A dentist who chooses to announce specialization shall use "specialist in" or "practice limited to" and shall limit the practice exclusively to the announced special area(s) of dental practice, provided at the time of the announcement the dentist has met in each approved specialty for which he/she announces the existing educational requirements and standards set forth by the American Dental Association.

A dentist who uses eligibility to announce as a specialist or a limitation of practice to make the public believe that specialty services rendered in the dental office are being rendered by qualified specialists when such is not the case is engaged in unethical conduct. The burden of responsibility is on the specialist to avoid any inference that general practitioners who are associated with the specialist are qualified to announce themselves as specialists or limitations of practices.

**General Standards:** The following are included within the standards of the American Dental Association for determining the education, experience and other appropriate

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requirements for announcing specialization and limitation of practice:

1. The special area(s) of dental practice and an appropriate certifying board must be approved by the American Dental Association.
2. The dentists must have successfully completed an educational program accredited by the Commission on Accreditation of Dental and Dental Auxiliary Education Programs, two or more years in length, as specified by the American Dental Association Council on Dental Education or be diplomates of an American Dental Association recognized certifying board.
3. The dentist's practice shall be limited exclusively to the special area(s) of dental practice in which the dentist has announced.

**Standards of Multiple Specialty Announcements:** Educational criteria for announcement as a specialist or limitation of practice in an additional recognized area(s) are the successful completion of an educational program accredited by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs in each area for which the dentist wishes to announce.

Dentists who completed their advanced education in programs listed by the American Dental Association Council on Dental Education prior to the initiation of the accreditation process in 1967, and who are currently ethically announcing as specialists or limitation of practice in a recognized area, may announce in additional areas provided they are educationally qualified or are certified diplomates in each area for which they wish to announce.

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Documentation of successful completion of the educational program(s) must be submitted to the appropriate constituent society. The documentation must assure that the duration of the program(s) is a minimum of two years except for oral and maxillofacial surgery, which must have been a minimum of three years in duration.<sup>2</sup>

**SECTION 9. GENERAL PRACTITIONER ANNOUNCEMENT OF SERVICES**

General dentists who wish to announce the services available in their practices are permitted to announce the availability of those services so long as they avoid any communications that express or imply specialization. The dentist shall also state that the services are being provided by a general dentist. No dentist shall announce available services in any way that would be false or misleading in any material respect. The phrase "practice limited to" shall be avoided by general dentists.

**SECTION 10. ADVERTISING**

Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect.

**Advisory Opinions:**

1. A member shall not disseminate, permit or cause to be disseminated, or participate in the benefits from

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any form of advertising containing a statement or claim which is false or misleading in any material respect, for the purpose of, directly or indirectly, soliciting patients or inducing the rendering of dental services.

2. A statement or claim is false or misleading in any material respect when it:

a. Contains a misrepresentation of fact;

b. Is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;

c. Is intended or is likely to create false or unjustified expectations of favorable results and/or costs;

d. Relates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors.

e. Contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as "as low as," "and up," "lowest prices," or words or phrases of similar import.

4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity – for example, "low fees" – must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to

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ETHICS

establish the accuracy of the comparison or statement of relativity.

5. Any member who compensates or gives anything of value to a representative of the press, radio, television or other communication medium in anticipation of, or in return for, professional publicity must make known the fact of such compensation in such publicity.

6. A member may not use any professional card, professional announcement card, office sign, letterhead, telephone directory listing, dentists' list, dental directory listing or a similar professional notice or advice if it includes a statement or claim that is false or misleading in any material respect.

7. A dentist shall not issue or cause to be issued through any medium, a public statement expressing or implying official sanction of the American Dental Association, California Dental Association, or any of its component societies, without due consent of the governing body of said organization. Upon receiving such authorization, the member shall ascertain that any public statement is scientifically correct and complies with the *Code of Ethics*.

8. Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect.

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ETHICS**SECTION 11. CARDS, LETTERHEADS AND ANNOUNCEMENTS**

A dentist may utilize professional cards, announcement cards, recall notices to patients of record and letterheads when the style and text are not false or misleading in any material respect.<sup>2</sup>

**SECTION 12. OFFICE DOOR LETTERING AND SIGNS**

A dentist may utilize office door lettering and signs provided that their style and text are not false or misleading in any material respect.<sup>2</sup>

**SECTION 13. DIRECTORIES**

Dentists may permit the listing of their names in a telephone directory, community directory or guide, dental list or dental directory, or in a membership roster, membership directory or other membership list of a service club, charitable organization, fraternity, school alumni association or business, professional or trade association to which they belong, provided such listing is not false or misleading in any material respect.<sup>2</sup>

**SECTION 14. NAME OF PRACTICE**

As the name under which a dentist conducts a dental practice may be a factor in the selection process of the patient, use of a trade name or an assumed name that is false or misleading in any material respect is unethical. Use of the name of a dentist no longer actively associated with the practice may be continued for a period not to exceed one year.<sup>2</sup>

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ETHICS**Advisory Opinion:**

1. The use of a trade name or an assumed name could mislead laymen concerning the identity, responsibility and status of those practicing thereunder. Therefore, it is improper to mislead a patient or misrepresent the dentist's skills, training, identity, services, or fees, either directly or indirectly, through the use of a trade name or assumed name. Except as permitted by state or federal law, a dentist shall practice only under his/her own name, the name of a dentist employing him/her who practices in the same office, a partnership name composed only of the name of one or more of the dentists practicing in a partnership in the same office or a corporate name composed only of the name of one or more of the dentists practicing as employees of the corporation in the same office.

**SECTION 15. EMERGENCY SERVICE**

Dentists shall be obliged to make reasonable arrangements for the emergency care of their patients of record. Reasonable arrangements shall be defined in accordance with the standards established by the component dental society. Failure of the component society to establish such standards shall not excuse the dentist from the duty to provide emergency care to all patients of record.

The dentist shall be obliged when consulted in an emergency by a patient not of record to make reasonable arrangements for emergency care. If emergency treatment is provided, the dentist, upon completion of such treatment, is obliged to return the patient to the dentist of record, unless the patient expressly reveals a different preference.

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**ETHICS****SECTION 16. CONSULTATION AND REFERRAL**

A dentist shall be obliged to seek consultation, if possible, whenever the welfare of the patient will be safeguarded or advanced by utilizing those who have special skills, knowledge and experience. When a patient visits or is referred to a specialist or consulting dentist for consultation:

1. A dentist has a duty to make reasonable inquiry to determine whether a prospective patient is currently the patient of another dentist.

2. A specialist or consulting dentist upon completion of the care shall return the patient, unless the patient expressly reveals a different preference, to the referring dentist, or if none, to the dentist of record for future care.

3. A specialist shall be obliged when there is no referring dentist and upon completion of the treatment to inform the patient when there is a need for further dental care.

**SECTION 17. USE OF AUXILIARY PERSONNEL**

Dentists have an obligation to protect the health of their patients by not delegating to a person less qualified any service or operation which requires the professional competence of a dentist. Dentists have the further obligation of prescribing and supervising the work of all auxiliary personnel in the interest of rendering the best service to the patient.

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**ETHICS****SECTION 18. THIRD PARTY PRACTICE**

A dentist may enter into an agreement with individuals and/or organizations to provide dental health care provided that the agreement does not permit or compel practices which lead to unethical conduct.

In the performance of such contracts the dentist is required to deal fairly with the public and fellow practitioners in the locality.

A dentist who submits any billing for services rendered or to be rendered which is fraudulent, deceitful, or misleading is engaged in unethical conduct.

It is unethical for dentists to contract for services under conditions that make it impossible to render service to their patients in a timely and reasonable manner.

**SECTION 19. JUSTIFIABLE CRITICISM**

Dentists shall be obliged to report to the appropriate reviewing agency instances of gross and/or continual faulty treatment by another dentist. Patients should be informed of their present oral health status without disparaging comment about prior services.

**Advisory Opinions:**

1. It is the duty of a dentist to report instances of gross and/or continual faulty treatment. However, this section is entitled "Justifiable Criticism." When informing patients of the status of their oral health, the dentist should exercise care that the comments made are justifiable. This would include finding out from the previous treating dentist under what circumstances and conditions the treatment was

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**ETHICS**

performed. A difference of opinion as to preferred treatment should not be communicated to the patient in a manner which would imply mistreatment.

2. If comments are made which are obviously not supportable, and, therefore, unjustified, such comments can be the basis for association disciplinary proceedings against the dentist making such statements.

**SECTION 20. EXPERT TESTIMONY**

Dentists may provide expert testimony when that testimony is essential to a just and fair disposition of a judicial or administrative action.

A dentist has the right to speak out against any policies espoused by organized dentistry, provided the dentist does not misrepresent such policies. It is unethical, however, for dentists to represent their views as those of the dental society or as those of the majority of the dentists of the community when in fact those views are opposed to those of the society or the majority of dentists in the community.

A dentist has the right to make fair comment with respect to dental health subjects, including dentists and the quality of dental care delivered and costs related thereto. However, it is unethical to publish, cause to be published or encourage the publication of comments on such subjects if the dentist does so without having sufficient information which would justify a reasonable dentist to believe the comments to be true. The burden shall be on the commenting dentist to produce the evidence upon which he/she based those comments and to establish therefrom that a reasonable dentist would be justified in believing the

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**ETHICS**

comments to be true. For the purposes of this section, the word "publication" means any form of communication including, without limitation, the press, radio, television and lecture.

**SECTION 21. REBATES, SPLIT FEES AND OTHER FEE ARRANGEMENTS**

A dentist may not accept or tender "rebates" or "split fees." Other fee arrangements between dentists or other persons or entities of the healing arts which are not disclosed to the patient are unethical.

**SECTION 22. AGENTS AND METHODS**

The dentist has an obligation to prescribe, dispense, promote or utilize only those drugs, agents or procedures which, in the dentist's judgment, will favorably contribute to the health of the patient.

Except for limited investigative purposes, the dentist also has the obligation to prescribe, dispense or utilize only those therapeutic agents or procedures which are supported by scientific evidence. The dentist has the further obligation of not holding out as exclusive any agent, method or technique.

**SECTION 23. DISCOVERIES, PATENTS AND COPYRIGHTS**

Patents and copyrights may be secured by a dentist provided that such patents and copyrights shall not be used to restrict research or practice.

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**ETHICS****SECTION 24. HEALTH EDUCATION OF THE PUBLIC**

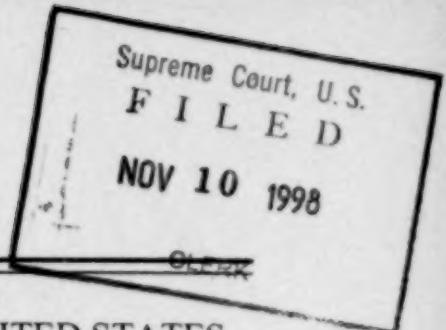
A dentist may participate in a program of health education of the public, involving such media as the press, radio, television, and lecture, provided that such programs are in keeping with the dignity of the profession.

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<sup>1</sup> A third party is any party to a dental prepayment contract that may collect premiums, assume financial risks, pay claims, and/or provide administrative services.

<sup>2</sup> Notwithstanding any ADA *Principles of Ethics and Code of Professional Conduct* or other standards of dentist conduct which may be differently worded, this shall be the sole standard for determining the ethical propriety of such promotional activities. Any provision of an ADA constituent or component society's code of ethics or other standard of dentist conduct relating to dentists' or dental care delivery organizations' advertising, solicitation, or other promotional activities which is worded differently from the above standard shall be deemed to be in conflict with the ADA *Principles of Ethics and Code of Professional Conduct*.

(11)  
97-1625



IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1998

CALIFORNIA DENTAL ASSOCIATION,  
PETITIONER,

v.

FEDERAL TRADE COMMISSION  
RESPONDENT.

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER  
CALIFORNIA DENTAL ASSOCIATION

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November 10, 1998

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51 pp

## QUESTIONS PRESENTED

The Federal Trade Commission (the “Commission”) issued an administrative complaint alleging that the California Dental Association (“CDA”), a nonprofit professional association, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by prohibiting member dentists, through its Code of Ethics, from engaging in false or misleading advertising. Despite the finding by the Administrative Law Judge that CDA’s enforcement of its Code of Ethics “has no negative impact on competition,” the Commission and the Court of Appeals held that CDA violated the antitrust laws. The two questions on which the Court granted certiorari are:

1. Whether the Commission has jurisdiction over nonprofit professional associations.
2. Whether a nonprofit professional association violates the antitrust laws under the rule of reason when its advertising disclosure requirements are animated by procompetitive purposes, do not directly affect price or output, and have no negative impact on competition.

**RULE 29.1 LISTING**

The California Dental Association has no parent companies or nonwholly owned subsidiaries.

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**BRIEF OF PETITIONER  
CALIFORNIA DENTAL ASSOCIATION**

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**OPINIONS BELOW**

The opinion of the court of appeals is reported at 128 F.3d 720 and is reproduced in the Appendix to the Petition for Writ of Certiorari ("Cert. App.") at 8a. The order denying rehearing is reproduced at Cert. App. 266a. The opinion of the Commission and the initial decision of the Administrative Law Judge ("ALJ") are reproduced at Cert. App. 43a and Cert. App. 159a, respectively.

**JURISDICTION**

The judgment of the court of appeals was entered on October 22, 1997. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Certiorari was granted on September 29, 1998.

**STATUTORY PROVISIONS**

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 44, provides in pertinent part:

The words defined in this section shall have the following meaning when found in this subchapter, to wit:

\* \* \* \*

"Corporation" shall be deemed to include any company . . . or association . . . which is organized to

carry on business for its own profit or that of its members . . .

Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), provides in pertinent part:

(1) Unfair methods of competition, . . . and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce.

#### STATEMENT OF THE CASE

This case involves a nonprofit professional association charged with restraining trade by enforcing a provision of its code of ethics which bars false and misleading advertising. The Commission and the United States Court of Appeals for the Ninth Circuit each presumed that CDA's Code of Ethics had an anticompetitive effect, despite the ALJ's finding that:

the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has *no impact on competition* in any market in the State of California, *particularly with respect to price and output*.

Cert. App. 246a (emphasis added, citation omitted). The Court granted certiorari to review two significant issues raised by the decision below: *first*, does the Commission have jurisdiction over CDA as a nonprofit professional association; and *second*, can a prohibition against false and misleading advertising, which has been affirmatively found to have no impact on competition, nonetheless violate the antitrust laws.

#### 1. Factual Background

##### a. The California Dental Association

CDA is an association of dentists whose main purpose is to benefit the public by promoting the dental health of the citizens of California. CDA is not organized for profit, has no shares of stock or certificates of interest, and no portion of its net earnings inures to the benefit of any member or individual. The dues revenue received by CDA is not distributed to its officers, members or directors. Rather, CDA's funds are used to implement the objectives and goals of the association as specified by its Bylaws and Articles of Incorporation. CDA is exempt from federal income taxation under United States Code, Title 26, Section 501(c)(6). Cert. App. 161a-62a, 189a; TR 1141-42, 1770.

CDA promotes a vast array of educational, scientific, and public health objectives. It develops material for use in community dental health projects such as school screenings, baby bottle tooth decay education and senior abuse/neglect detection. CDA provides information to the public regarding scientific aspects of dental treatment and procedures, and up-to-date data on public health issues such as AIDS, transmission of infectious diseases, infection control techniques and hazardous substances. The association is instrumental in maintaining California's Denti-Cal program, which provides dental care to the poor. Over 5,500 CDA members participate in Denti-Cal. Cert. App. 164a-65a, 178a; TR 1148-49, 1154.

CDA assists dentists in complying with federal and state regulatory requirements, including their obligations under the Occupational Safety and Health Act, Environmental Protection Agency regulations, labor laws and the Americans with Disabilities Act. CDA is also a leading force in continuing dental education, offering seminars and workshops covering scientific, clinical, practice management and other areas. Through its publications, CDA provides member dentists with up-to-date information regarding

dental research, techniques and materials, as well as legal and legislative news. Cert. App. 181a-84a; TR 1150, 1161-62.

CDA promotes public health even when doing so is contrary to the economic interests of its members. It led the fight for fluoridation in California, perhaps the most cost-effective dental health initiative enacted, despite the fact that fluoridation reduces the need for dental care. Cert. App. 188a-89a; TR 814-15, 1300-01.

CDA also engages in certain ancillary activities such as lobbying concerning dental issues, marketing, and providing patient relations seminars and administrative procedures for resolving patient complaints. CDA has several for profit subsidiaries through which members can obtain liability and other types of insurance, financing for equipment purchases and home mortgages, and auto leasing. These services are also available to dentists from other sources. Cert. App. 144a, 165a-70a, 181a-82a; TR 303, 1170, 1639.

Membership in CDA is entirely voluntary. CDA membership is not a prerequisite to licensure or the successful practice of dentistry. While approximately 75% of the practicing dentists in California are members of CDA, more than 5,000 dentists in active practice in California do not belong to CDA. Cert. App. 144a, 161a-62a, 245a; TR 733-34.

#### **b. CDA's Code of Ethics**

CDA's Code of Ethics provides the "basic system for self regulation of the dental profession" in California. Joint Appendix ("J.A.") 25. The Code's requirements reinforce "the obligations inherent in the practice of a profession," including "[t]he necessity of intensive education and training," "[t]he need for continuing education and training to maintain and improve professional knowledge and skills" and "[d]edication to service rather than to gain or profit." *Id.* at 25-26. (CDA's Code of Ethics)

The Commission's complaint focuses on one provision of the Code, Section 10, that prohibits false and misleading advertising. Section 10 provides in pertinent part:

Although any dentist may advertise, no dentist shall advertise or solicit patients . . . in a manner that is false or misleading in any material respect.

J.A. 33. CDA has issued eight advisory opinions to assist dentists in interpreting Section 10. *Id.* at 33-35. Advisory opinions are not binding and are not considered part of the Code. *Id.* at 24. CDA relies on California law, the regulations of the state Board of Dental Examiners and the California Business and Professions Code to define what is false and misleading. Cert. App. 190a-91a. CDA's enforcement of Section 10 is an attempt to fill the gap left by the state, which does not enforce its dental advertising requirements due to budgetary and staff constraints. *Id.* at 218a-19a.

The Commission's complaint centers on the application of the Code to price and quality advertising. The Code of Ethics does not prohibit either type of advertising. Rather, the Code has been interpreted to require member advertising claims to disclose verifiable facts, to insure that consumers are not misled. Advertisements regarding discounts are required to state (1) the amount of the non-discounted fee, (2) the amount or percentage of the discount, (3) the length of time the discount will be available, (4) a list of verifiable fees, and (5) an identification of those who qualify for the discount. Cert. App. 200a. Advertisements consisting of unverifiable pricing claims, such as "lowest prices" or "bargains," have been challenged as being not susceptible of measurement and therefore likely to be false or misleading. *Id.* at 198a-99a. Similarly, Section 10 is violated by quality or superiority claims that use subjective and ambiguous phrases that are not susceptible to measurement. Unverifiable claims, such as "progressive" dentistry or

"finest dental care," are considered likely to deceive or mislead the public. *Id.* at 202a-205a, 215a-18a.

CDA's Code of Ethics applies only to dentists associated with CDA. Non-CDA dentists are free to advertise as they please, subject to federal and state law. The maximum sanction that CDA could impose on a member who violates the Code is exclusion from CDA. As the ALJ found, "CDA membership is not a prerequisite to successful practice in any California dental market." Cert. App. 245a, 144a, 161a-62a, 196a; TR 1170-71, 1352-53.

### **c. The Competitive Effect of CDA's Advertising Disclosure Policies**

The Commission presented *no evidence*, even in the form of expert testimony, regarding the alleged competitive effect of CDA's challenged practices. Cert. App. 110a. No evidence was presented regarding the impact of CDA's advertising guides on the prices or output of dental services. The Commission failed even to present empirical evidence on whether CDA's advertising policies affected the amount or type of dental advertising in California. Indeed, the evidence suggests that price and quality dental advertising is flourishing in California and dental advertisements have increased since the early 1980's. TR 191-92, 513-14, 720-21, 1135; RX 134; CX 1592-1602.

Based on the evidence presented at trial, the ALJ made several critical findings on the competitive effect of CDA's advertising policies, including:

1. "complaint counsel have not produced any convincing evidence that CDA members have acted or could act together to raise prices or reduce output, nor have they established in what geographic market or markets the alleged market power could be exercised." Cert. App. 262a.
2. "the activities of the California Dental Association with respect to their enforcement of their Code of

Ethics relative to advertising has no impact on competition in any market in the State of California, particularly with respect to price and output." *Id.* at 246a (citation omitted).

3. "CDA's enforcement of its Code of Ethics with respect to advertising has no negative impact on competition in any dental market in California because it cannot erect any barriers to entry . . . into any dental market in California." *Id.* at 245a (citation omitted).
4. "The oversupply of dentists . . . [is] strong evidence of low entry barriers." *Id.* (citation omitted).
5. "CDA membership is not a prerequisite to successful practice in any California dental market." *Id.* (citation omitted).
6. "CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local." *Id.* at 262a (citation omitted).
7. "CDA has a legitimate interest in fostering truthful, informative advertising by its members . . ." *Id.* at 258a (citation omitted).
8. "Professor Knox [CDA's economic expert] . . . testified that scrutiny of dental advertising is procompetitive because advertising which is false or misleading has a negative impact on competition." *Id.* at 245a-46a (citation omitted).

In light of the above findings, the ALJ concluded that the Commission failed "to establish the conditions for satisfaction of a Rule of Reason analysis." Cert. App. 262a.

### **2. Proceedings Below**

#### **a. The Administrative Hearing**

The Commission asserted jurisdiction over CDA under Section 4 of the FTC Act, claiming that CDA is "organized

to carry on business for its own profit or that of its members." Cert. App. 47a. The ALJ found that the Commission had jurisdiction over CDA because "a substantial part of CDA's activities result in pecuniary benefits to its members." *Id.* at 253a. On whether CDA violated Section 5 of the FTC Act, the ALJ ruled that the Commission's failure to show anticompetitive effects was "not fatal" to the Commission's claim. *Id.* at 262a. Instead, he applied the Commission's analytical approach announced in *In re Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988) ("Mass. Bd."), and concluded that CDA's Code of Ethics is "inherently suspect" and can be "quickly condemned" without a detailed market analysis. Cert. App. 257a, 259a, 262a. The ALJ faulted enforcement of the Code as overbroad because it barred "inexact" and incomplete advertisements "without regard to their truth." *Id.* at 260a.

#### **b. The Commission Decision**

The Commission, by a vote of four to one, affirmed the ALJ's finding of a violation, but disagreed with the ALJ's analytical approach on the competitive effect of CDA's Code of Ethics. Cert. App. 45a. On the jurisdictional issue, the Commission ruled that CDA comes within Section 4 of the FTC Act because "CDA confers pecuniary benefits upon its members as a substantial part of its activities." *Id.* at 51a-52a. With respect to the competitive effect of CDA's Code, the Commission majority declared that it would not follow its own *Mass. Board* decision. *Id.* at 63a n.7. Instead, the majority determined that CDA's guidelines for discount advertising constituted a *per se* violation of the antitrust laws, even though the Code conceded "differ[s] from the classic price fixing conspiracy." *Id.* at 63a.

Alternatively, the Commission majority applied a so-called "quick look" rule of reason approach to the Code's treatment of discount and quality advertising. The majority acknowledged that its application of the rule of reason was "simple and short," involving no substantial analysis of

competitive effects or any attempt to quantify any increase in price or reduction in output. Cert. App. 74a, 78a. Nonetheless, the Commission disagreed with the ALJ's finding that CDA lacked market power, relying on CDA's enforcement of its Code of Ethics and the voluntary membership of 75% of California's practicing dentists. *Id.* at 78a, 80a-82a.

Commissioner Azcuenaga dissented. She described the majority's *per se* and "quick look" approaches as "chimerical" and unable to "withstand the hard light of day." Cert. App. 108a. The focus of Commissioner Azcuenaga's dissent was the "weakness of the majority's anticompetitive effects story." *Id.* at 146a. She noted that, at trial, the Commission "did not offer evidence, even in the form of testimony of an expert economist, on fundamental elements of a rule of reason analysis." *Id.* at 110a. She found "startling" the majority's "failure to identify a geographic market before finding liability" and its "treatment of the entry issue." *Id.* at 147a. Commissioner Azcuenaga concluded: "No anticompetitive effects having been shown, the complaint should be dismissed . . ." *Id.* at 110a.

The Commission entered a highly regulatory order that requires CDA, *inter alia*, to: (1) cease and desist from prohibiting advertising of superiority claims, comparative claims, quality claims, subjective claims and puffery, prices, including discounted prices, guarantees, claims using adjectives or superlatives, and claims of exclusive methods or techniques; (2) remove from its Code of Ethics Section 10 and advisory opinions 2(c), 2(d), 3, 4, and 8 thereto; and (3) within 120 days review the file of each dentist currently under a disciplinary order or suspension or for whom CDA membership was denied or withdrawn during the past ten years to determine if the discipline, suspension or denial was consistent with the order. Cert. App. 29a-33a.

### c. The Court of Appeals Decision

By a two to one vote, the United States Court of Appeals for the Ninth Circuit affirmed the Commission's finding of a violation, but disagreed in part with the Commission's approach. On the jurisdictional issue, the Ninth Circuit focused on CDA's marketing, lobbying, continuing education and financing assistance to dentists in holding that CDA "is engaged in substantial business activities that provide tangible, pecuniary benefits to its members." Cert. App. 16a. The court, therefore, found that "the FTC properly exercised jurisdiction over the CDA." *Id.*

On whether CDA's Code of Ethics violated the antitrust laws, the majority rejected the Commission's application of the *per se* rule. The majority recognized that the *per se* rule is inappropriate "where the economic impact of the restraint is not immediately obvious and where the restraint is a rule adopted by a professional organization." Cert. App. 17a (citations omitted). The majority noted the value of CDA's policy on false advertising and stated that the Commission's claim that the Code is overbroad requires "further inquiry into its effects on competition." *Id.* at 18a.

Nonetheless, the majority approved the Commission's "quick look" approach because it deemed CDA's advertising guides to be "fairly 'naked'" restraints. Cert. App. 18a. The majority acknowledged that CDA's policies simply mandate more disclosure, "which enhances rather than limits price competition." *Id.* at 19a. However, the majority eliminated the Commission's need to show anticompetitive effects and shifted the burden of proof to CDA, observing that there is "no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing." *Id.*

As to CDA's treatment of quality advertising, the majority recognized the danger that subjective quality claims "are inherently unverifiable and therefore misleading." Cert. App. 20a. But the majority ruled that this legitimate concern "does not justify banning all quality claims without regard to

whether they are, in fact, false or misleading." *Id.* Characterizing CDA's treatment of quality claims as "a form of output limitation," the court approved the Commission's quick look analysis. *Id.* at 19a-20a.

Judge Real dissented from both the majority's holding on jurisdiction and its application of the "quick look" approach. Judge Real stated that CDA, as a nonprofit professional association, does not operate commercially and "ha[s] no place in the commercial world of the F.T.C." Cert. App. 25a. He also noted that CDA's advertising guides are not "sufficiently anti-competitive on their face to eschew a full-blown rule of reason inquiry." *Id.* Judge Real recognized that CDA's Code simply required full disclosure and "[f]ull disclosure is neither price fixing nor is it a ban on non-deceptive advertising." *Id.* at 26a. He criticized the majority for applying a quick look approach "in the absence of any naked restraints" and for finding "a restraint on competition without the supporting help from any of the economic principles to be applied to a full market power analysis." *Id.*

### SUMMARY OF ARGUMENT

1.A. The clear language of the FTC Act does not confer jurisdiction on the Commission over nonprofit professional associations. Under Section 4 of the FTC Act, Commission jurisdiction over corporations is limited to those that are "organized to carry on business for [their] own profit or that of [their] members." 15 U.S.C. § 44. This limitation on Commission jurisdiction was purposeful. The same Congress that enacted the FTC Act also passed the Clayton Act, which Congress made applicable to all corporations and associations.

The only court thoroughly to analyze the applicability of the FTC Act to nonprofit associations was the Eighth Circuit in *Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969). Applying well established rules of statutory construction, *Community Blood*

*Bank* found that the FTC Act did not apply to two nonprofit associations even though the Commission found that they provided "exceedingly profitable" benefits and valuable services to their members. *In re Community Blood Bank of the Kansas City Area, Inc.*, 70 F.T.C. 728, 864 (1966). The Eighth Circuit ruled that the FTC Act is limited to entities that are "organized" to conduct "business" for the pecuniary "profit" of their members, as those words are commonly understood.

B. CDA is not organized to conduct business for its own profit or that of its members. CDA is a nonprofit California corporation and is exempt from federal income taxation under United States Code, Title 26, Section 501(c)(6). CDA's main purpose is to benefit the public by promoting dental health. It does so even when contrary to the economic interests of its members. CDA has no shares of stock and no portion of its revenues inures to the benefit of any member.

Nevertheless, the Ninth Circuit determined that the Commission has jurisdiction over CDA. It did so by substituting the word "profit" in Section 4 of the FTC Act with "tangible, pecuniary benefits." This interpretation of Section 4 conflicts with the explicit language of the statute and with the Eighth Circuit's decision in *Community Blood Bank*. The Ninth Circuit's construction of the statute would extend the Commission's jurisdiction to virtually every nonprofit organization or professional association, a result that is directly contrary to the clear statutory language. As Judge Real succinctly observed in his dissent, "[t]hese nonprofit membership organizations have no place in the commercial world of the F.T.C." Cert. App. 25a.

C. In light of the clear language of Section 4, resort to legislative history is unnecessary. Nonetheless, what little legislative history bears on the meaning of Section 4 supports CDA's position. The legislative history makes it clear that Congress intended to create a commission that

would be expert in evaluating industrial businesses. While numerous witnesses representing manufacturing firms and other for profit, commercial entities testified on the FTC Act, there is not a single reference in the legislative history to a representative of a voluntary professional association.

Also telling is Congress' rejection of the Commission's request in 1977 to amend Section 4 to extend its jurisdiction to nonprofit organizations. The then-chairman of the Commission recognized the need for a congressional enactment to specifically include nonprofits in Section 4 in light of *Community Blood Bank*. Nonetheless, Congress was not persuaded to expand the Commission's jurisdiction. Further, during the first sixty years of its existence, the Commission itself accepted the limitation on its jurisdiction. Not a single action was filed against a professional association between 1914 and 1975. The Commission's failure to assert jurisdiction over nonprofit professional associations for so long is strong evidence that Congress did not grant such jurisdiction.

D. It is plain from the language of Section 4 that Congress granted the Commission jurisdiction over commercial and business entities that make a "profit" as that word is ordinarily understood. Congress did not grant the Commission jurisdiction over nonprofit professional associations. If the Commission seeks coverage of all entities that provide "tangible, pecuniary benefits" to their members, it must obtain such a dramatic expansion of the statute from Congress.

2.A. The Commission and the Ninth Circuit improperly evaluated CDA's advertising guidelines under the "quick look" rule of reason. Under this approach, CDA's Code of Ethics was presumed to injure competition. This presumption flies in the face of the ALJ's finding, after a full trial, that CDA's enforcement of its advertising policy "has no impact on competition in any market." Cert. App. 246a. In fact, CDA's advertising guidelines promote competition

by prohibiting false and misleading advertising and promoting the dissemination of information necessary for consumers to make informed choices.

The full "rule of reason" is the prevailing standard for evaluating conduct under the antitrust laws. Under the rule of reason, the party challenging a practice must show that the practice has had anticompetitive effects in a relevant market. If the defendant shows that the practice has procompetitive benefits, the practice is unlawful only if its anticompetitive effects outweigh its procompetitive benefits. Only certain "naked" restraints are presumed to be anticompetitive under the *per se* rule or the "quick look" rule of reason. No matter what antitrust standard is applied, this Court has ruled that "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 103 (1984).

B. This Court and the courts of appeals have applied the "quick look" approach only to conduct that is anticompetitive on its face and has no procompetitive justification. In no case has the "quick look" been used, as it was here, to declare conduct unlawful where it has been found to have no anticompetitive effect.

CDA's ethical guides regarding advertising differ fundamentally from conduct that has been judged under the "quick look" approach. CDA's guidelines are not facially anticompetitive and they have a procompetitive purpose and effect. CDA's disclosure provisions are designed to provide the consumer with the information needed for informed decision-making. Its guidelines for discount advertising prevent deception by encouraging disclosure of facts needed to evaluate such claims. This Court has recognized that disclosures in professional advertising are beneficial to consumers. The Commission mandates disclosures in a number of its own guides and trade regulation rules to insure that consumers have the facts upon which to make reasoned

choices. CDA's guidelines serve the same procompetitive purposes.

CDA's policies regarding "quality" claims are equally procompetitive. Quality claims by professionals are particularly difficult for consumers to evaluate. Nothing in CDA's Code or its enforcement prevents dentists from making verifiable factual claims regarding the quality of their services. CDA's ethical code simply stands for the proposition that subjective and ambiguous claims – e.g., "progressive" dentistry, "finest dental care" – are unverifiable, convey no useful information and carry a significant potential for deception.

After a full administrative trial, the ALJ determined that CDA's Code had "no impact on competition in any market in the State of California, particularly with respect to price or output." Cert. App. 246a. The ALJ conceded that the Commission failed "to establish the conditions for satisfaction of a Rule of Reason analysis." *Id.* at 262. Nonetheless, the Commission and the Ninth Circuit inferred injury to competition without a "detailed analysis." *Id.* at 23. The reliance on inference in the face of the ALJ's findings disregards this Court's holdings that inferences regarding competitive effects must give way to facts. In the words of the ALJ, the government produced no "convincing evidence that CDA members have acted together or could act together to raise prices or reduce output." *Id.* at 262a. As Judge Real pointed out in his dissent, the Ninth Circuit erred by finding a restraint "without the supporting help from any of the economic principles to be applied to a full market power analysis." *Id.* at 26a.

C. This case demonstrates the risk of overboard application of the "quick look" rule of reason. Here, the Ninth Circuit found a violation of the antitrust laws despite the Code's acknowledged procompetitive purpose and the ALJ's conclusion that the Code had no anticompetitive effects. Thus, CDA is barred from engaging in conduct –

enforcing its Code of Ethics – that likely has significant procompetitive benefits and, at worst, is competitively neutral. If the Ninth Circuit’s decision is permitted to stand, it will have a substantial chilling effect on the ability of professions to prevent false and misleading advertising. The expanded “quick look” approach applied by the Ninth Circuit will also have a negative impact on commercial conduct outside the professions. If businesses are required to justify conduct even when it is not facially anticompetitive, innovative business strategies will be stifled out of fear of antitrust liability.

## ARGUMENT

### I. THE COMMISSION DOES NOT HAVE JURISDICTION OVER CDA

#### A. The Clear Language Of The Statute Does Not Vest The Commission With Jurisdiction Over Nonprofit Professional Associations

The unambiguous language of the FTC Act and the statutory scheme of the antitrust laws clearly demonstrate the absence of Commission jurisdiction in this case. Section (5)(a)(2) of the FTC Act expressly restricts the Commission’s jurisdiction to “persons, partnerships, or corporations.” 15 U.S.C. § 45(a)(2). Section 4 defines “corporations” to include only “any company . . . which is organized to carry on business for its own profit or that of its members.” *Id.* at § 44.

The limiting language utilized by Congress to define the jurisdiction of the Commission was purposeful. The same Congress that enacted the FTC Act expressly made the Clayton Act, like the Sherman Act before it, applicable to all corporations and associations regardless of whether these organizations were for profit or nonprofit.<sup>1</sup> Unlike the

<sup>1</sup> The Clayton Act, 15 U.S.C. § 8, and the Sherman Act, 15 U.S.C. § 1, apply to all “persons.” These two statutes define “persons” to encompass all “associations existing under or authorized by the laws of

Clayton and Sherman Acts, the FTC Act is not a “carefully studied attempt” to bring within it every type of legal entity. *See United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 553 (1944). To the contrary, the limiting language of the FTC Act clearly manifests an attempt specifically to restrict the jurisdiction of the Commission to exclude nonprofit professional associations.

The United States Court of Appeals for the Eighth Circuit considered this limitation on the Commission’s jurisdiction in *Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969) (“Community Blood Bank”). In interpreting what constitutes a corporation organized “for its own profit or that of its members,” the court of appeals relied upon several familiar rules of statutory construction: that the Commission has only such jurisdiction as Congress conferred upon it by statute; that when the Commission’s jurisdiction is challenged, it has the burden of establishing its jurisdiction; that legislative intent should be ascertained from the language of the statute itself when it is clear and plain; that the plain, obvious, rational meaning of the statute is to be preferred to any “curious, narrow, hidden sense;” and that “common words are to be taken in their ordinary significance” in the absence of any evidence of a contrary intent. *Id.* at 1015. Where, as here, the language of a statute is clear and unambiguous, review of the statute’s legislative history is unnecessary. *See, e.g., Dunn v. CFTC*, 519 U.S. 465, 480-81 (1997) (Scalia, J., concurring).

In *Community Blood Bank*, the Commission asserted jurisdiction over Community Blood Bank (“CBB”), the Kansas City Hospital Association and individual pathologists. 405 F.2d at 1013. CBB was organized as a

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either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.” 15 U.S.C. § 12; 15 U.S.C. § 7.

nonprofit. *Id.* The Hospital Association was a nonprofit which included as members Blue Cross Service Corporation, a 501(c)(4) corporation,<sup>2</sup> two for profit corporations, and a number of 501(c)(3) corporations.<sup>3</sup> *In re Community Blood Bank of the Kansas City Area, Inc.*, 70 F.T.C. 728, 755-57 (1966). After a full trial, the Hearing Examiner found that the Commission had jurisdiction over the respondents and that the respondents had collectively restrained trade by impeding the development of two commercial blood banks. *Id.* at 881-82. The Commission affirmed this decision. *Id.* at 947.

The Commission determined that it had jurisdiction because the Hearing Examiner had made specific findings relating to the pecuniary benefits that each of these associations had provided to its members, which were "in the broadest sense exceedingly profitable for the doctors and for the hospitals to receive." *Id.* at 864. The Commission also found that "the Hospital Association is also engaged in business for the benefit or profit of its members when it supplies to them information and other services which they might otherwise have to gather or render themselves." *Id.* at 909-10.

The Eighth Circuit reversed the Commission's decision and held that the CBB and the Hospital Association were outside the scope of the Commission's jurisdiction. *Community Blood Bank*, 405 F.2d at 1022. Although the

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<sup>2</sup> United States Code, Title 26, Section 501(c)(4) exempts from taxation "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare."

<sup>3</sup> United States Code, Title 26, Section 501(c)(3) provides an exemption for "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals."

Hospital Association may have provided "valuable services" to its members, the Eighth Circuit recognized that, in light of the FTC Act's language and legislative history, the Commission's jurisdiction is limited to entities that are "organized" to conduct "business" for the pecuniary "profit" of their members, as those words are commonly understood. *Id.* at 1017-18, 1020. To help define the word "profit," the court quoted the following language from the Supreme Court of Wisconsin:

[W]hether dividends or other pecuniary benefits are contemplated to be paid to its members is generally the test to be applied to determine whether a given corporation is organized for profit.

*Id.* at 1017 (quoting *Associated Hosp. Serv., Inc. v. City of Milwaukee*, 13 Wis. 2d 447, 466, 109 N.W.2d 271, 280 (Wis. 1961)).

#### **B. CDA Is Not Organized For Its Own Profit Or That Of Its Members**

It is well established that words in a federal statute are to be "interpreted as taking their ordinary, contemporary, common meaning" unless otherwise defined. *See Perrin v. United States*, 444 U.S. 37, 42 (1979). The term "profit" is widely used and understood to mean the excess of revenues over investment or expenses. *Community Blood Bank*, 405 F.2d at 1017. Here, the Commission concedes that CDA is not "organized" as a for profit business entity. But neither is CDA engaged in business for the profit of itself or its members.

CDA is organized as a nonprofit California corporation. The main purpose of the association is to benefit the public by promoting the dental health of the citizens of California. CDA has no shares of stock and no portion of its revenues inures to the benefit of any member or individual. CDA dues and other revenues are used solely to implement the goals and objectives of the association as specified in its Bylaws and Articles of Incorporation. CDA is exempt from

federal income taxation under United States Code, Title 26, Section 501(c)(6). Cert. App. 161a-62a, 189a; TR 1141-42, 1770.<sup>4</sup>

CDA promotes a wide variety of educational, scientific and public health objectives, including community dental health projects such as dental care for the poor, the provision of educational materials and services to public and private agencies, and providing dentists with programs and materials concerning dental research, techniques and practices. Cert. App. 164a-65a, 178a; 181a-84a; TR 1148-50, 1154, 1161-62. CDA promotes public health regardless of its impact on the economic interests of its members. For example, the CDA was at the forefront of the program to provide fluoridation, which reduces the need for dental care. Cert. App. 188a-89a; TR 814-15, 1300-01. While CDA does provide some ancillary services for its members, such as patient relations seminars, assistance in complying with governmental laws and regulations, and lobbying activities, and has subsidiaries that provide insurance and financing programs, these activities do not generate any profit for CDA or its members. Cert. App. 144a, 165a-70a, 181a-82a; TR 303. Nor do these activities make CDA a commercial or business entity.

As the Eighth Circuit held in *Community Blood Bank*, Congress gave the Commission jurisdiction only over corporations “organized” for profit; it did not confer jurisdiction over every corporation that provided “tangible,

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<sup>4</sup> Significantly, Congress enacted Section 501(c)(6) in October 1913, before Section 4 of the FTC Act, and the distinction between for profit and nonprofit organizations under Section 501(c)(6) parallels the distinction made by FTC Act Section 4. In order to qualify for an exemption under Section 501(c)(6), an organization must establish that it is “not organized for profit” and that “no part of [its] net earnings . . . inures to the benefit of any private shareholder or individual.” 26 U.S.C. § 501(c)(6). See also *National Muffler Dealers Ass’n v. United States*, 440 U.S. 472, 478 (1979) (discussing legislative history of § 501(c)(6)).

pecuniary benefits” to its members as the Commission argues in this case.<sup>5</sup> Nevertheless, the Ninth Circuit determined that the Commission had jurisdiction over CDA, and approved the Commission’s effort to nullify the statute by reading the word “profit” out of the statute. The Ninth Circuit introduced a “surrogate” for “profit,” namely, the provision of “tangible, pecuniary benefits.” Cert. App. 16a. Significantly, Section 4 of the FTC Act does not include the language “tangible, pecuniary benefits.”

Indeed, the *Community Blood Bank* court criticized the Commission for differentiating between for profit and nonprofit corporations for the purpose of defining the language “organized to carry on business for its profit.” The Eighth Circuit noted that the Commission interpreted “profit” in a for profit corporation to mean it was organized in order that its shareholders have an equity interest in the corporation and its income and that they have an entitlement to share in the profits and in the assets upon dissolution. *Community Blood Bank*, 405 F.2d at 1016. On the other hand, the Commission interpreted “profit” in the case of nonprofits more broadly because nonprofits do not distribute profits and their members are not entitled to the corporation’s assets upon dissolution. *Id.* The court held that neither the legislative history nor the language of the FTC Act supports the Commission’s contention that Congress intended “profit” to be given different interpretations depending upon the character of the

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<sup>5</sup> Under the standard articulated in *Community Blood Bank*, the Commission is not bound by the mere form of incorporation. The Commission is free to determine whether an entity operates “in law and in fact” as a *bona fide* nonprofit corporation. See *In re Ohio Christian College*, 80 F.T.C. 815, 848 (1972) (asserting jurisdiction over ostensible nonprofit based on finding it was a mere “shell” for an individual entrepreneur “to further his own finance and comfort”). However, where, as here, an association is organized and operated as a genuine nonprofit entity, the Commission’s inquiry is at an end and the association is beyond the Commission’s jurisdiction.

corporation under consideration. *Id.* at 1016-17. It observed:

[B]y limiting the corporations to be embraced within the provisions of the Act, Congress intended to exclude some corporations from the Commission's jurisdiction.

*Id.* at 1017.

The Ninth Circuit rejected *Community Blood Bank* and followed instead the approach of the Second Circuit's decision in *American Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982) ("AMA"). In *AMA* the Second Circuit, with minimal analysis, found that the AMA served both its members' business and non-business interests and that the business aspects of the AMA fall within the scope of the Commission's jurisdiction. *Id.*

Here, the Ninth Circuit erroneously found that the CDA activities being regulated by the Commission relate to the business affairs of the members. Cert. App. 16a. This flies in the face of what the Commission has sought to regulate, namely, the CDA's Code of Ethics.<sup>6</sup> The construction of Section 4 used by the Second and Ninth Circuits would extend the scope of the Commission's jurisdiction to cover virtually every nonprofit organization or professional association – a result directly contrary to the express language of the statute. The Commission's continuing campaign to litigate the self regulatory efforts of professional societies imposes enormous burdens on these societies and directs their scarce resources from their nonprofit and

socially desirable objectives. As Judge Real succinctly observed, "These nonprofit membership organizations have no place in the commercial world of the F.T.C." *Id.* at 25a.

### C. The Legislative History Supports CDA's Position

Although the clear language and plain meaning of the FTC Act make it unnecessary to resort to legislative history, the legislative history of the FTC Act confirms that the Commission does not have jurisdiction over nonprofit professional associations such as CDA. Instead, the legislative history demonstrates that Congress limited the scope of the FTC Act to the regulation of industrial and commercial entities organized and operated for profit, or combinations of such entities, and expected the Commission to develop specialized knowledge concerning such for profit entities.

Congress passed the FTC Act in large part because members believed that judicial enforcement of the Sherman Act had been inadequate. See S. Rep. No. 62-1326, at 13 (1913); S. Rep. No. 63-597, at 8-9 (1914); H.R. Rep. No. 63-1142, at 18-19 (1914). The legislative history repeatedly reports that members of Congress expected that the Commission would be "an administrative body of practical men thoroughly informed in regard to business," would have unique expertise concerning "the business and economic conditions of . . . industry," would have "a vast mass of information in numerous branches of industry," and would be "in continual touch with the business organizations in the various industries." H.R. Rep. No. 63-1142, at 18-19 (1914); S. Rep. No. 63-597, at 8-9 (1914). As one of the managers of the Senate bill explained, the Act was designed to create "a trade tribunal to assist in the administration of the [antitrust laws] respecting general industry." 51 Cong. Rec. 11379 (Sen. Cummins). In other words, Congress limited application of the FTC Act to "industrial business,"

<sup>6</sup> The Ninth Circuit also cited *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976). Cert. App. 15a. However, in that case, the court upheld the Commission's jurisdiction based on the express finding that the Commission on Egg Nutrition "was organized for the profit of the egg industry." *Egg Nutrition*, 517 F.2d at 488. Here, there is no similar finding.

particularly manufacturers, dealers, and associations or other combinations of such entities.<sup>7</sup>

The identity of the witnesses who testified concerning the proposed establishment of the Federal Trade Commission provides strong confirmatory evidence that Congress never intended the FTC Act to cover nonprofit professional associations. *See Chicago Transit Auth. v. Flohr*, 570 F.2d 1305, 1309 (7th Cir. 1977) ("[A] strong inference as to the purpose of the Act can be gleaned from the identity of the witnesses who testified."). More than 130 witnesses testified. *Hearings on H.R. 12120 to Establish Interstate Trade Commission Before Comm. on Interstate and Foreign Commerce*, 63d Cong. (1914). Numerous representatives of manufacturing corporations and other for profit, commercial and industrial entities testified. *Id.* The legislative history does not contain a single reference to a representative of a voluntary professional association. This conclusion is further confirmed by the fact that, when the FTC Act was passed, it was widely believed that the professions were not subject to any antitrust laws. *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 552-53 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

It is also significant that Congress rejected the Commission's 1977 request that it amend Section 4 of the FTC Act to extend its jurisdiction to nonprofit organizations, including professional associations. *See Proposed Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate*

<sup>7</sup> *Hearings on H.R. 12120 to Establish Interstate Trade Commission Before Comm. on Interstate and Foreign Commerce*, 63d Cong. (1914); S. Rep. No. 63-597, at 11, 25 (1914); 51 Cong. Rec. 8840 (Rep. Covington) ("covers industrial business"); *id.* at 8851 (Rep. Stevens) (discussing retailers and manufacturers and the "producers of coal and lumber"); *id.* at 8986 (Rep. Montague) ("great industrial and commercial concerns").

*and Foreign Commerce*, 95th Cong. (1977) ("1977 Hearings"). As Commission Chairman Collier conceded:

The bill [H.R. 3816] would make several changes in the jurisdiction of the Commission. In particular, it would: (1) Broaden the reach of the FTC Act by redefining "corporation" to include nonprofit corporations . . . . We strongly support each of these changes.

*1977 Hearings* at 69.

Chairman Collier argued that the proposed statutory change was necessary in light of the Eighth Circuit's decision in *Community Blood Bank*:

After *Community Blood Bank*, the Commission efforts to reach nonprofit corporations engaged in deceptive or anticompetitive practices have succeeded only after the often time-consuming proof that the respondent, whatever its nominal form, was in reality a conduit for essentially commercial interests.

*Id.* at 82. Chairman Collier testified that the Commission encountered such problems when it challenged "activities of nonprofit corporations of a less traditionally commercial character." *Id.* However, Congress was not persuaded to extend the scope of the FTC Act. The Committee on Interstate and Foreign Commerce of the House of Representatives rejected the proposed provision to broaden the Commission's jurisdiction after hearing testimony noting the absence of jurisdiction under the current wording of Section 4. H.R. Rep. No. 95-339, at 120 (1977). *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980) (relying in part on Congressional inaction to discern legislative intent).

For many years the Commission itself seemed to accept the limitation on its jurisdiction. During the first 60 years of its existence, the Commission filed no actions against professional associations. The first complaint against such an association was filed in 1975. *AMA*, 638 F.2d at 447. In

an analogous context, this Court has held that the Commission's failure to assert jurisdiction over practices in intrastate commerce for so many decades "is a powerful indication" that Congress never granted such jurisdiction, particularly in light of the Commission's unsuccessful attempt to secure such authority. *FTC v. Bunte Bros.*, 312 U.S. 349, 351-52 (1941). Similarly, the Commission here not only failed to assert jurisdiction over nonprofit professional associations during the first six decades of its existence, but also failed to secure an express grant of such jurisdiction from Congress.

#### **D. Only Congress Can Amend The FTC Act**

The plain language of Section 4 of the FTC Act establishes the limitation imposed by Congress over the Commission. Manifestly, Congress provided jurisdiction to the Commission over commercial and business associations which make a profit as that term is defined by *Community Blood Bank*. It did not, nor did it intend to, include nonprofit professional associations such as CDA within the ambit of the Act.<sup>8</sup>

The Commission's tactic of referring to whether a nonprofit professional association provides "tangible, pecuniary benefits" rather than whether it is "organized for its own profit or that of its members" should not be countenanced by this Court since it completely eviscerates Congressional intent. If the statute is to be revised in such a manner, it must be done by Congress. *See, e.g., Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 79 (1979).

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<sup>8</sup> This does not mean that these associations would have an exemption from the antitrust laws since they would continue to be subject to the Sherman Act. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

#### **II. CDA'S CONDUCT SHOULD HAVE BEEN JUDGED UNDER A FULL RULE OF REASON ANALYSIS**

CDA's ethical advertising guide serves the express purpose of preventing false and deceptive advertising. The Code encourages dentists to disclose specific fee information in lieu of unverifiable discount advertisements. It also requires dentists to refrain from making unverifiable subjective claims about the pricing and quality of dental care. J.A. 33-35. These requirements are procompetitive on their face, as they encourage the increased flow of accurate information about dental services, while filtering out ads that tend to mislead consumers.

The ALJ tested the competitive effects of CDA's Code under the rule of reason in a full trial. His finding confirmed the absence of any harm to competition:

the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has *no impact on competition* in any market in the State of California, *particularly with respect to price and output*.

Cert. App. 246a (emphasis added, citation omitted).

Nonetheless, the Commission and the Ninth Circuit held that CDA violated the antitrust laws under a "quick look" approach that presumed competitive injury. In so doing, they erroneously extended the "quick look" beyond the limited class of cases to which this truncated approach has been applied by this Court and the courts of appeals, and beyond what is supportable by sound public policy. A practice that is not anticompetitive, either on its face or in its effects, cannot be condemned summarily under the antitrust laws.

**A. A Full Rule Of Reason Analysis Is The Prevailing Standard For Assessing A Restraint's Competitive Effects**

Section 1 of the Sherman Act, and Section 5 of the FTC Act, prohibit only conduct that unreasonably restrains competition. *See State Oil Co. v. Khan*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 275, 279 (1997). The "test of legality" is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

The "rule of reason" is the prevailing standard for evaluating a restraint's impact. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). Under the rule of reason, the party challenging a practice has the burden of showing that the conduct has an anticompetitive effect in a relevant product and geographic market. *See Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1569-70 (11th Cir. 1991). Such an effect can be shown directly, through proof of an increase in price or a reduction in output. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) ("IFD"). If direct evidence is unavailable, competitive injury may be inferred from a showing of market power in a properly defined market, including the existence of barriers to entry. *See id.* Market power is the ability to raise prices above the level that would prevail in a competitive market. *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984) ("NCAA").

If the party challenging the conduct shows anticompetitive effect, the defendant must respond by demonstrating that the conduct promotes competition. The finder of fact then balances the anticompetitive effects proved by the plaintiff against the procompetitive benefits shown by the defendant. *Seagood*, 924 F.2d at 1569. The

rule of reason is violated only if the anticompetitive effects outweigh the procompetitive benefits. *Id.*

Carefully limited and well identified practices have been determined by this Court to be so pernicious and lacking in procompetitive benefits that a rule of reason analysis is unnecessary. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Such conduct, principally horizontal price fixing, is deemed to be *per se* illegal. *See id.* Few practices are so condemned. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 178 (1965) ("[T]he area of *per se* illegality is carefully limited."). Because the *per se* rule precludes analysis of a practice's competitive impact, it is applied only after "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Khan*, 118 S. Ct. at 279 (internal quotation omitted); *see also Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985). In recent years, this Court has required more analysis of actual competitive effect, not less, before condemning business practices under the antitrust laws. *See, e.g., Northwest Wholesale Stationers*, 472 U.S. at 296-97; *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9-10 (1979). Indeed, on at least two occasions, this Court has overturned earlier precedents, and analyzed under the rule of reason conduct it previously had held to be illegal *per se* when it appeared that the conduct may have net procompetitive benefits. *See Khan*, 118 S. Ct. at 282-84; *Continental T.V.*, 433 U.S. at 54-57.

This Court has applied an "abbreviated" rule of reason only to a very limited group of practices. In *NCAA*, the Supreme Court for the first time stated that the rule of reason, in certain circumstances, could be "applied in the twinkling of an eye." 468 U.S. at 109 n.39 (internal quotation omitted). There, the Court was confronted with a practice that was a "naked restraint on price or output" for which "the anticompetitive consequences" were "apparent."

*Id.* at 106, 110. Although unwilling to condemn the practice as being illegal *per se*, this Court nonetheless invalidated it without “a detailed market analysis” because the challenged conduct had no plausible procompetitive justification. *Id.* at 110, 113-20.

Ultimately, whatever test is applied, “the criterion to be used in judging the validity of a restraint on trade is its impact on competition.” *NCAA*, 468 U.S. at 104. “[T]here is a presumption in favor of a rule-of-reason standard,” and “departure from that standard must be justified by demonstrable economic effect.” *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988). “Unless the practice ‘almost always’ makes consumers worse off, it is not subject to condemnation without more detailed study of its effects – including proof of market power and actual injury.” *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 727 (7th Cir. 1986) (Easterbrook, J.).

#### B. The Ninth Circuit Improperly Applied The “Quick Look” Approach

In its two-to-one decision below, the Ninth Circuit properly ruled that CDA’s Code of Ethics is not *per se* unlawful. Cert. App. 18a. In so holding, the majority noted that CDA’s ethical policies “do not, on their face, ban truthful, nondeceptive ads.” *Id.* at 18a. It acknowledged that CDA’s justification for its policies – preventing false and misleading advertising – is a “legitimate, indeed procompetitive, goal”; and it conceded “that as a general matter disclosure can augment competition and increase market efficiency by providing consumers more information.” *Id.* at 19a.<sup>9</sup> Nonetheless, the majority

<sup>9</sup> The ALJ confirmed CDA’s “legitimate interest in fostering truthful, informative advertising” and that “scrutiny of dental advertising is pro-competitive.” Cert. App. 245a, 258a.

summarily condemned the CDA’s disclosure provisions under the “quick look” approach. *Id.* at 18a-19a.

The Ninth Circuit’s misapplication of the abbreviated rule of reason ignores this Court’s precedents, disregards the ALJ’s finding of no competitive injury and imperils, rather than enhances, competition in the professions.

#### 1. This Court has applied the abbreviated rule of reason only to naked restraints that have actual anticompetitive effects

This Court has invalidated conduct through the “quick look” in only two cases. In each, the conduct at issue was anticompetitive on its face and had no procompetitive justification. Moreover, summary condemnation was consistent with the trial court’s finding as to the conduct’s actual anticompetitive effects.

In *NCAA*, the Court considered rules of the National Collegiate Athletic Association (“NCAA”) that limited the number of games member football teams could televise and had the effect of setting prices networks would pay for the right to televise games. 468 U.S. at 91-93. The rules, on their face, fixed prices and reduced output. *Id.* at 113. Because the NCAA failed to identify any plausible procompetitive rationale, the Court condemned the challenged practices without “a detailed market analysis.” *Id.* at 110, 113-20. A detailed analysis was unnecessary given that the “anticompetitive consequences of this arrangement [were] apparent” and “no countervailing competitive virtues [were] evident.” *Id.* at 104, 110 n.42 (internal quotation omitted). Further, summary condemnation was consistent with the district court’s factual finding that the NCAA’s conduct “ha[d] operated to raise prices and reduce output.” *Id.* at 113.

Facially anticompetitive conduct also was at issue in *IFD*. There, a group of dentists organized a “union” solely to evade the antitrust laws. 476 U.S. at 451. The group promulgated a “work rule” which prohibited members from

supplying x-rays to insurers, who were using the x-rays to review the dentists' diagnoses. *Id.* at 450. The Court found that the dentists' rule was "a horizontal agreement . . . to withhold from . . . customers a particular service that they desire – the forwarding of x rays to insurers." *Id.* at 459. Such an arrangement had an obvious anticompetitive character. In fact, after a lengthy trial, the Commission found that the challenged practice had caused "actual, sustained adverse effects on competition." *Id.* at 451-52, 461. In the absence of any countervailing procompetitive virtue, the Court held that the restraint violated the rule of reason even without a detailed showing of its impact on competition. *Id.* at 459-61.

Adhering to the narrow circumstances present in *NCAA* and *IFD*, the lower courts have held that the abbreviated rule of reason is appropriate only where conduct is "on its face" a restraint on price or output for which there is no procompetitive justification. *Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n*, 95 F.3d 593, 601 (7th Cir. 1996) (Cudahy, J., concurring) ("[T]he 'quick look' approach should have a narrow application, reflecting its recent and sharply delimited origin in the *NCAA* case."); *American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781, 789 (9th Cir. 1996) ("[T]his so-called 'quick look' analysis is the exception, rather than the rule."); *Vogel v. American Soc'y of Appraisers*, 744 F.2d 598, 603 (7th Cir. 1984) (summary condemnation of ethical bylaw improper unless "it has clear anticompetitive consequences and lacks any redeeming competitive virtues"). Absent exceptional circumstances, courts of appeals continue to evaluate antitrust claims under the traditional rule of reason analysis. *See, e.g., United States v. Brown Univ.*, 5 F.3d 658, 678 (3d Cir. 1993).

As exemplified by this case, a full rule of reason analysis is necessary in most instances to ensure that procompetitive or competitively neutral conduct is not mistakenly condemned. *Chicago Prof'l Sports*, 95 F.3d at

602 (Cudahy, J., concurring). No court, except the Ninth Circuit in this case, has used the "quick look" to condemn facially procompetitive conduct that was found to have no anticompetitive effects.

## 2. CDA's advertising guidelines are procompetitive on their face

CDA's advertising guidelines differ fundamentally from the conduct condemned in *NCAA* and *IFD* in that they are procompetitive in nature, by increasing the supply of accurate information, and do not involve nakedly anticompetitive misconduct. As the Ninth Circuit conceded, "CDA's policies do not, on their face, ban truthful, nondeceptive ads." Cert. App. 18a. The policies instead prevent misleading and deceptive advertising.

### a. The prevention of misleading and deceptive professional advertising is procompetitive

Self regulation of the ethical conduct of professionals generally serves procompetitive ends. In *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 696 (1978) ("*Prof'l Eng'rs*"), this Court noted that professional "[e]thical norms may serve to regulate and promote . . . competition, and thus fall within the Rule of Reason."

The procompetitive role of professional ethical codes is particularly true as to professional advertising. Consumers frequently lack sufficient information to evaluate adequately professional services, and there is little standardization of such services. *See STEPHEN BREYER, REGULATION AND ITS REFORM* 27-28 (1982) ("The layman cannot readily evaluate the competence of a doctor or lawyer."). Advertising by professionals "poses special risks of deception" to consumers. *In re R.M.J.*, 455 U.S. 191, 200 (1982). Thus, "professional deception is a proper subject of an ethical canon." *Prof'l Eng'rs*, 435 U.S. at 696. Indeed, in *Bates v. State Bar*, 433 U.S. 350, 384 (1977), this Court noted that professional associations have a special role to play in

assuring that professional "advertising . . . flows both freely and cleanly."

**b. CDA's disclosure provisions prevent misleading professional advertising and increase consumer information**

The CDA's disclosure provisions encourage member dentists to give consumers *more* information, not *less*. When advertising a price discount, CDA provides for disclosure of the non-discounted fee, the dollar amount or percentage of the discount, the length of time the discount will be honored, a list of verifiable fees, and an identification of the groups of persons eligible to receive the discount. Cert. App. 200a. These guides prevent deception caused by the failure to disclose the "variables and other relevant factors" needed to evaluate discount claims. J.A. 34.

Both this Court and the Commission have recognized the procompetitive benefit of disclosure requirements. In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 655 (1985), the Court approved Ohio's mandatory disclosures in the advertisement of contingency fees because the disclosures "prevent[ ] deception of consumers." *Id.* at 651. This conclusion was consistent with the Court's earlier admonition in *Bates* that, when a State seeks to prevent advertising which is misleading by omission, "the preferred remedy is more disclosure, rather than less." 433 U.S. at 375.

The Commission utilizes mandatory disclosures in a number of its guides and trade regulation rules to prevent consumer deception. Advertisements which must bear disclosures include those promoting bargains, the fuel economy of new cars, and pay-per-call services. 16 C.F.R. §§ 228.16(a)(4), 233.4(c), 259.2, 308.3(b) (1998). Commission disclosure requirements can be extensive. For example, the Commission's Funeral Industry Practices Rule states that it is a deceptive act to fail to disclose:

the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies, including at least the price of embalming, transportation of remains, use of facilities, caskets, outer burial containers, immediate burials, or direct cremations, to persons inquiring about the purchase of funerals.

*Id.* at § 453.2(a) (1998). *See also id.* at § 453.2(b)(4)(ii) (1998) (listing required disclosures).

The CDA's disclosure provisions serve the same procompetitive purpose as the Commission's. Information disclosed as a result of CDA's Code enables consumers to determine accurately the savings offered by a discount, whether an alleged "discount" is actually based on inflated non-discounted fees, when the discount is available, and whether they are entitled to receive the discount. None of this information is imparted in ads that say, for example, "10% off oral exams," even if the ads are literally true. CDA's disclosure policies allow consumers to evaluate and compare discount claims, without overburdening advertisements. Thus, these policies cannot be properly viewed as naked restraints on price or output meriting application of *NCAA*'s abbreviated rule of reason. Judge Real's dissent emphasized:

What the CDA was attempting to accomplish by its rules concerning advertising did not amount to a restraint on price competition . . . . What the CDA was monitoring was that dentists who wish[] to advertise discounts would have to fully disclose to the public the nature of the discounts. *Full disclosure is neither price fixing nor is it a ban on non-deceptive advertising.*

Cert. App. 25a-26a (emphasis added).<sup>10</sup>

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<sup>10</sup> Economists recognize that requiring disclosures can increase the flow of accurate price information to consumers and have the

Nor can the CDA's disclosure policies be summarily condemned, as the Ninth Circuit did, for requiring too much disclosure. Cert. App. 19a. The Ninth Circuit identified only *one* instance where it believed CDA's disclosure guidelines might become excessive – advertisements in which a dentist chose to promote "across-the-board-discounts." *Id.* The majority concluded that in such a case "it is simply infeasible to disclose all of the information that is required" by CDA. *Id.* In other words, a list of the fees for *every* dental procedure performed by a dentist would be too voluminous to include in an advertisement.

The summary invalidation of the CDA's disclosure policies on this ground exemplifies why use of the "quick look" was inappropriate. Even if it is infeasible for a dentist to run an ad which includes a list of *all* dental procedures he or she offers, this objection has no applicability to discounts that apply only to one or a few *specific* dental procedures (e.g., an ad offering a 10% discount off the price of an oral exam or filling a cavity). Not even the Commission asserts that it would be too onerous for a dentist to meet the CDA's information disclosure guidelines in such procedure-specific discount ads.<sup>11</sup>

Further, consumers suffer little or no loss of relevant pricing data if dentists choose not to advertise across-the-

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procompetitive effect of lowering prices. See Stephen A. Rhoades, *Reducing Consumer Ignorance: An Approach and Its Effect*, 20 ANTITRUST BULL. 309, 322-27 (1975) (describing benefits to consumers of mandated product disclosures).

<sup>11</sup> Studies have shown that while dentists offer over one hundred procedures, only a handful of dental procedures comprise a large percentage of a dentist's practice. See AMERICAN DENTAL ASSOCIATION, THE 1990 SURVEY OF DENTAL SERVICES RENDERED 25-29 (1994). Thus, a dentist can easily advertise discounts on the five procedures he or she most frequently performs, meet the CDA's disclosure requirements, and provide consumers with the information they need to evaluate prices for the procedures they are most likely to require.

board discounts rather than comply with the CDA's disclosure requirements. Ads that merely hawk services at "10% off" do not promote informed consumer choice. A consumer cannot determine whether a dentist offering 10% off his or her fees truly offers better prices than a dentist promoting a 5% discount, or no discount at all, unless ads disclose the base prices from which discounts are taken. Long before he penned the Commission's decision in this case, Chairman Pitofsky acknowledged this point:

[M]ost government charges of deceptive advertising have to do with product claims that are extremely difficult or impossible to measure by observation or use. How can a consumer determine the accuracy of a claim that a product has "twice as much vitamin C" as a competing brand? How can a consumer reliably evaluate a claim that a particular disinfectant "helps prevent colds and flu"? Even price claims can be difficult to evaluate – when the claim is "10 percent off manufacturer's list" or "lowest price in town."

Robert Pitofsky, *Advertising Regulation and the Consumer Movement*, in ISSUES IN ADVERTISING: THE ECONOMICS OF PERSUASION 27, 34 (David G. Tuerck ed., 1978) (emphasis added). The negligible informational content of such discounts claims is not lost on consumers. According to Chairman Pitofsky, ads merely offering "10 percent off" are "so ambiguous . . . that they will be ignored by almost all consumers." *Id.* at 39.

At worst, CDA's disclosure policies have procompetitive benefits, while potentially constraining some discount advertising. Contrary to the Ninth Circuit's approach, this realization begins the rule of reason inquiry; it does not end the analysis. To determine the net competitive effect of a disclosure requirement, its actual procompetitive and anticompetitive effects must be weighed in light of the market in which it operates. Such an analysis can be done only through a full rule of reason analysis. See *Vogel*, 744

F.2d at 603-04 (Posner, J.) (bylaw of professional association banning percentage fees may have procompetitive effect and, therefore, must be judged under full rule of reason); *see also* *Brown*, 5 F.3d at 678 (remand to district court to evaluate effects of conduct under full rule of reason).

The Commission did not even attempt a full evaluation of the competitive effects of CDA's policy. Instead, both the Commission and the Ninth Circuit presumed that CDA's disclosure provisions caused competitive injury without a "detailed analysis." Cert. App. 23a.

**c. CDA's substantiation policies prevent misleading professional advertising**

It is equally plain that CDA's substantiation policies do not constitute a naked restraint warranting a "quick-look" analysis. CDA's ethical code requires that claims about dental services be verifiable. Those that are unverifiable – such as claims that a dentist provides "progressive" dentistry or the "finest dental care" – are potentially misleading. Cert. App. 203a-06a, 208a. CDA's policy on quality claims is consistent with both the economic literature and court decisions regarding subjective ads.

Almost twenty years ago, Robert Reich noted that subjective product claims are of little or no benefit to consumers:

[A]dvertising presenting purely subjective claims about quality (such as "the best available") can be expected to generate very little efficient comparison shopping. Such advertising does not facilitate shopping because the units in which it is expressed do not lend themselves to comparison and the claims are not easily verifiable.

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Words or phrases whose meanings are imprecise, connoting a variety of attributes, are not factually verifiable, since it is unclear what facts are at issue.

Nor do they facilitate comparison shopping, since they do not represent uniform qualities or consistent measures.

Robert B. Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U. L. REV. 775, 801, 803 (1979). Reich's analysis of subjective claims is of particular import to professional services because of the difficulty consumers have in evaluating such claims by professionals.

This Court has recognized that subjective professional advertising is inherently misleading. In *Bates*, the Court stated that, "advertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." 433 U.S. at 383-84. Much earlier, in *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 609-10 (1935), this Court upheld an Oregon law providing for the revocation of a dental license where a dentist advertised, among other things, "superior" services, a guarantee, or promises to perform a dental operation "painlessly." The Court stated:

We do not doubt the authority of the State to estimate the baleful effects of such methods [of advertising] and to put a stop to them . . . . The community is concerned with the maintenance of professional standards which will insure . . . protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief.

*Id.* at 612.<sup>12</sup>

In addition, in *Friedman v. Rogers*, 440 U.S. 1, 3 (1978), this Court upheld a Texas statute prohibiting the

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<sup>12</sup> This Court cited approvingly to *Semler* in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

practice of optometry under "trade names" because of their potential for deception. *Id.* at 12-13. The Court held that the prohibition against trade names was appropriate because it still allowed "the factual information associated with trade names [to] be communicated freely and explicitly to the public." *Id.* at 16. The restriction increased the amount of useful information provided to consumers, as it "ensure[d] that information regarding optometrical services [would] be communicated more fully and accurately . . . than it had been in the past when optometrists were allowed to convey the information through unstated and ambiguous associations with a trade name." *Id.*

CDA's policies regarding quality claims operate in the same fashion. All that is prohibited are subjective, unverifiable claims. Nothing in CDA's guides or enforcement prohibits a dentist from making factual claims that can be objectively verified. He or she is free to advertise the facts that underlie subjective claims of the supposedly "progressive" or "finest" nature of his or her services. CDA's policies stand only for the proposition that terms like "progressive" or "finest," by themselves, convey no useful information and carry a significant potential for deception.

Even the Commission admitted it could not say CDA's guideline concerning "nonprice" advertising "facially appear[ed] to be one that would always or almost always tend to restrict competition and decrease output." *Id.* Cert. App. 73a (citation omitted). Indeed, the Commission's opinion conceded that advertising "a service as 'painless,' for example, may be inherently deceptive." *Id.* at 89a.<sup>13</sup>

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<sup>13</sup> The Commission's own rules restrict unverifiable advertising claims. For example, the Commission's environmental marketing rules state that "[u]nqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers." 16 C.F.R. § 260.7(a) (1998). According to the Commission, environmental claims that have the

In short, CDA's advertising policies, both as to price and quality, are not facially anticompetitive and do not directly affect the price or output of dental services. Thus, CDA's advertising guidelines are far different from the restraints in *NCAA* and *IFD* to which this Court applied a "quick look" analysis. Indeed, CDA's policies are procompetitive in that they encourage dentists to provide sufficient factual information in their advertisements to permit consumers to make reasoned decisions. *See Friedman*, 440 U.S. at 16. *See also Brown*, 5 F.3d at 677. Therefore, summary condemnation of CDA's policies was unwarranted. Advertising requirements promulgated by professional associations directed at potentially misleading and unverifiable claims, such as those at issue here, should be prohibited only upon a showing of anticompetitive effect after a full rule of reason analysis. No such showing was made in this case.

### 3. CDA's policies were found to have no anticompetitive effect

CDA's ethical guides differ from the conduct in *NCAA* and *IFD* in a second, critical respect. Unlike those cases, after a full trial, the ALJ found that CDA's enforcement of its Code of Ethics had "no impact on competition in any market in the State of California, particularly with respect to price and output." Cert. App. 246a (citation omitted). This finding was inevitable given the Government's complete failure to produce evidence of harm to competition. The ALJ found that "complaint counsel have not produced any convincing evidence that CDA members have acted or could act together to raise prices or reduce output." *Id.* at 262a (emphasis added). Complaint counsel did not even proffer expert testimony on competitive effects. Commissioner

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potential for deception include representations that a product is "Environmentally Friendly" and "Earth Smart." *Id.*

Azcuena's dissent summarized the glaring shortcomings of the Government's case:

In presenting their case, complaint counsel relied on a theory of virtual *per se* illegality and did not offer evidence, even in the form of testimony of an expert economist, on fundamental elements of a rule of reason analysis, such as market definition, barriers to entry and anticompetitive effects.

*Id.* at 110a.

The finding of no anticompetitive effect should have ended this action. The Commission and the Ninth Circuit, however, side-stepped the fatal deficiencies in the Government's case by *inferring* harm to competition. In an analysis it conceded was "simple and short," Cert. App. 74a, the Commission relied on evidence from a limited number of dentists regarding their alleged loss of some potential customers because of the inability to make prohibited claims in their advertising. *Id.* at 76a-78a. The Commission coupled this evidence with a cursory evaluation of the CDA's "market power," which even the Ninth Circuit acknowledged lacked "detailed analysis." *Id.* at 23a.

The Ninth Circuit's and the Commission's reliance on "inference" to brush aside the ALJ's factual findings disregards the holdings of this Court. The Court has made it clear that inferences regarding competitive effects must give way to actual facts:

Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record.

*Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992) (quotation omitted). *Accord Northwest Wholesale Stationers*, 472 U.S. at 297 n.8 (rejecting conclusion of Ninth Circuit which contradicted

district court's express finding of no anticompetitive effect). Exalting inference over evidence, as the Ninth Circuit did here, conflicts with the foundation principle underlying both the rule of reason and the *per se* rule – "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA*, 468 U.S. at 103.<sup>14</sup>

Indeed, the Commission made no effort to ascertain the actual impact of CDA's policies on the market. Membership in CDA is not required for the successful practice of dentistry in California. Over 5,000 dentists do not belong to CDA and are not governed by the Code of Ethics. Cert. App. 144a, 161a-62a; TR 1170-71, 1352-53, 1640-41. Evidence suggested that dental advertising in California has increased substantially over the past decade. TR 191-92, 513-14, 720-21, 1135; RX 134. Despite these facts, the Commission concluded that the anticompetitive nature of the CDA's advertising guidelines were "plain," even "without quantifying the increase in price or reduction in output occasioned by these restraints." Cert. App. 78a. As Commissioner Azcuena concluded: "The evidence does not support the conclusion that CDA can control the price and output of dental services in California." *Id.* at 145a.

Moreover, the minimal anecdotal evidence of selected dentists cited by the Commission in no way undercuts the ALJ's finding of no harm to competition. One former Commission official (who was at the Commission when the *CDA* case was litigated) zeroed in on the inadequacy of the Commission's evidence:

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<sup>14</sup> The United States Court of Appeals for the D.C. Circuit has expressly held that the Commission may not infer injury to competition when such an inference ignores contradictory evidence showing an absence of competitive effects. *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1144 (D.C. Cir. 1988) ("Specific, substantial evidence of absence of competitive injury is . . . sufficient to rebut what is, after all, only an inference.") (internal citation omitted).

In all, this evidence merely established that some consumers responded to some dentists' advertisements by using their services. It could not establish that this type of advertising fostered competition or that consumers who got their information on the quality of dental care from dentists' advertisements had to do without such advertising . . . .

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The fact that particular dentists who drew patients by claiming to practice "gentle dentistry" could not make such claims by virtue of a restriction does not tell us whether the restriction actually affected competition . . . .

Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis*, 64 ANTITRUST L. J. 613, 631-32 (1996).

Given that the very purpose of the rule of reason is to determine a restraint's impact on competition, the ALJ's finding of no anticompetitive effect is dispositive. As Judge Real pointed out, the Ninth Circuit's majority opinion "finds a restraint on competition without the supporting help from any of the economic principles to be applied to a full market power analysis." Cert. App. 26a. Had either the Commission or the Ninth Circuit conducted a full rule of reason inquiry in this case, it could not have condemned CDA's conduct. Indeed, the ALJ specifically found that the Commission failed "to establish the conditions for satisfaction of a Rule of Reason analysis." *Id.* at 262a. The Ninth Circuit's use of an analytical short-cut to strike down CDA's practices, where no impact was shown, turns the rule of reason on its head.

### C. The Ninth Circuit's Improper Use Of The "Quick Look" Rule of Reason Jeopardizes Efficient Conduct

This case presents in stark relief the hazards of overbroad application of the "quick look" rule of reason.

The ALJ candidly admitted that CDA's conduct could not be invalidated under a full rule of reason analysis. Cert. App. 262a. Nonetheless, through the use of inference and presumption, the Commission and the Ninth Circuit found a violation of the antitrust laws.

Last term, this Court acknowledged that the use of legal short-cuts, which permit a court to invalidate a practice without careful examination of its competitive impact, not only suppresses procompetitive conduct, but may also inadvertently facilitate practices that harm consumers. *Khan*, 118 S. Ct. at 283. This Court admonished that summary denunciation of a practice must be avoided except where experience with the practice enables a court "to predict with confidence that the rule of reason will condemn it." *Id.* at 279. In all other cases, the delicate balancing required to protect and enhance consumer welfare can be accomplished only by thorough analysis of a practice's competitive effect under the full-scale rule of reason. As then-Judge Breyer noted in *Barry Wright Corp. v. ITT Grinnell Corp.*:

[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.

724 F.2d 227, 234 (1st Cir. 1983). The Ninth Circuit's significant broadening of the abbreviated rule of reason in this case threatens that very harm, as it weakens the ability of the professions to prevent fraudulent and misleading advertising.

The Ninth Circuit's expanded "quick look" also is likely to have a chilling effect beyond professional codes of conduct. If conduct that is not facially anticompetitive can be presumed to be unlawful, a firm must shoulder the burden of demonstrating a practice's procompetitive impact in order to rebut that presumption. Broader use of the "quick look" analysis will lead to findings of violations where, as here, the challenged practices have had no anticompetitive effect.

Thus, the Ninth Circuit's approach can only harm consumer welfare by inhibiting the implementation of innovative business strategies. See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3, 15 (1984) (condemnation of procompetitive or competitively neutral conduct is particularly costly to a competitive economy). One commentator has already predicted this very result from the type of "quick look" analysis employed by the Ninth Circuit. James A. Keyte, *What It Is and How It Is Being Applied: The "Quick Look" Rule of Reason*, ANTITRUST, Summer 1997, at 21, 24 (imposing burden on defendants places them "at a distinct disadvantage and has the potential of condemning conduct that may well be 'efficient' without the government ever having to prove anticompetitive effects").

The Ninth Circuit's decision contravened basic tenets of antitrust law. It used a "quick look" to invalidate conduct which is not a naked restraint on price or output, and has no anticompetitive effects. At trial, the Commission had a full opportunity to prove that CDA's advertising policies unreasonably restrained trade. It failed to make the required showing. The judgment of the Ninth Circuit should be reversed and enforcement of the Commission's Order should be denied.

## CONCLUSION

The Commission lacked jurisdiction over CDA as a nonprofit professional association. Even if the Commission had jurisdiction over CDA, the Ninth Circuit and the Commission erred in presuming that CDA's advertising guidelines were anticompetitive. CDA respectfully requests that the Court reverse the judgment of the Ninth Circuit.

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# In the Supreme Court of the United States

OCTOBER TERM, 1998

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CALIFORNIA DENTAL ASSOCIATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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BRIEF FOR THE RESPONDENT

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**QUESTIONS PRESENTED**

1. Whether petitioner is subject to the jurisdiction of the Federal Trade Commission as an association "organized to carry on business for \* \* \* [the] profit \* \* \* of its members," within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.
2. Whether the Federal Trade Commission conducted a sufficient analysis to determine, under the antitrust rule of reason, that petitioner's restrictions on its members' advertising of prices, discounts, and quality violated Section 5 of the FTC Act, 15 U.S.C. 45.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1625

CALIFORNIA DENTAL ASSOCIATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE RESPONDENT**

**STATEMENT**

1. This case involves advertising restrictions imposed as a condition of membership by petitioner California Dental Association (CDA). Petitioner's members include 75% of the dentists actively practicing in California. Pet. App. 161a-162a. Petitioner has 32 local component dental societies, and membership in a local association is mandatory for membership in petitioner. *Id.* at 162a. In addition, membership in petitioner is mandatory for California dentists who wish to be members of the American Dental Association. *Id.* at 46a. Although membership in petitioner is legally voluntary and is not required for a license to practice dentistry, membership is highly valued by California dentists for its "real economic benefit," and "no one gives up membership" in petitioner to avoid its restrictions on advertising. *Id.* at 84a; see also *id.* at 232a-234a (detailing importance of CDA membership to dentists).

Petitioner is organized under California law as a nonprofit corporation. Pet. App. 161a. It is exempt from federal income tax under 26 U.S.C. 501(c)(6), the tax category for “[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, [and] professional football leagues.” It does not qualify for exemption as a charitable institution under Section 501(c)(3). See Pet. App. 50a-51a, 174a.

Although petitioner’s stated purposes include improvement of public health, it also describes itself as “represent[ing] dentists in all matters that affect the profession” and “offer[ing] far more services to its members than any other state [dental] association.” Pet. App. 51a.<sup>1</sup> Petitioner offers broad assistance to its members to increase their revenues and decrease their costs. As its promotional literature describes (J.A. 20-23), petitioner provides its members with services such as job placement, recruitment of dental assistants, review of proposed contracts with third-party payers (vaunted as affording a substantial savings over hiring a private attorney), and financial planning seminars. Pet. App. 51a-52a, 172a-188a. Through a for-profit subsidiary, petitioner offers low-cost malpractice insurance, which saves members at least \$1,000 annually over other insurance plans; this insurance is available in California only to CDA members. *Id.* at 166a, 173a, 184a-185a. Other for-profit subsidiaries offer, exclusively to members, financing for dental equipment, financing assistance for patients, and a home mortgage program. *Id.* at 166a-168a, 185a-186a; see also *id.* at 181a-183a (seminars, training sessions, and publications offered to members at steeply discounted rates).

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<sup>1</sup> In the last year that petitioner explicitly reported its public service expenditures, they accounted for 7% of its annual budget. J.A. 19; Pet. App. 52a. In the same year, expenses for “direct member services” were 65% of petitioner’s budget, and administration and indirect member services accounted for an additional 20 percent. *Ibid.*

Petitioner engages in lobbying and litigation concerning laws and regulations that affect dentists’ businesses; its lobbying successes “mean money” to members, or so it claims, and have saved members thousands of dollars each year. Pet. App. 176a, 177a-179a; see J.A. 20.<sup>2</sup> Petitioner also conducts marketing and public relations initiatives to enhance the image of its members; these activities have brought members, on average, an additional \$6,000 of annual income from new patients, equaling a “20-to-1 return on investment.” Pet. App. 179a-180a. In sum, petitioner estimates that the potential value to members who take advantage of a selection of its services is \$22,000 to \$65,000, and that the value to members of its benefits far exceeds their membership dues. *Id.* at 175a.

2. Section 10 of petitioner’s Code of Ethics, on its face, prohibits advertising that is “false or misleading in any material respect.” Pet. App. 9a; J.A. 33. The record in this case demonstrates, however, that petitioner has broadly interpreted and enforced that prohibition in a way that effectively prohibits (a) most advertising about relative prices, (b) all advertising of across-the-board price discounts, and (c) virtually all advertising claims, whether relative or absolute, about the quality of a member’s dentistry or service. Pet. App. 55a. These prohibitions cover even advertising claims that “are not false or misleading in a material respect.” *Id.* at 260a; see *id.* at 56a-57a n.6.

Thus, petitioner has prohibited its members from using terms such as “low,” “reasonable,” or “affordable” in their

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<sup>2</sup> Although some of petitioner’s lobbying has advocated measures to promote public health, much of its lobbying has been directed at protecting members’ profitability. Thus, petitioner has opposed legislation regarding mandatory health insurance coverage for part-time employees and treatment of infectious and hazardous waste, and it has supported malpractice-liability and workers’ compensation reforms. Pet. App. 177a-179a.

advertising, whether or not they truthfully describe the dentist's fees, Pet. App. 65a-66a, 198a-199a, under the reasoning that members' statements about their fees must be "exact" and must "fully and specifically disclos[e] all variables and other relevant factors" to avoid being branded misleading, *id.* at 9a-10a, 64a; J.A. 34-35. Under similar reasoning, petitioner has disallowed such phrases as "affordable, quality dental care," "making teeth cleaning \* \* \* inexpensive," Pet. App. 65a, "affordable family dentistry," *id.* at 199a, "reasonable fees quoted in advance," *id.* at 227a, and "Fees that Fit a Family Budget," *id.* at 237a.

As for advertising about discounted fees, petitioner has required that such advertising contain at least five disclosures: (1) the dollar amount of the nondiscounted fee; (2) either the dollar amount of the discounted fee or the percentage of the discount for the specific service; (3) the length of time that the discount will be offered; (4) a list of verifiable fees; and (5) specific groups qualifying for the discount and any other terms or conditions for the discount. Pet. App. 64a-65a, 200a. The practical effect of those requirements is "nearly prohibitive" of advertising of any broadly applicable discounts. *Id.* at 201a.<sup>3</sup> Indeed, petitioner has disapproved a broad array of discounting offers because they were not accompanied by the required disclosures.<sup>4</sup>

<sup>3</sup> One dentist testified that, to advertise an across-the-board discount, a member would have to list his regular fees for 100-300 procedures. Pet. App. 201a. A member of petitioner's Judicial Council (which is responsible for enforcing its Code of Ethics, see *id.* at 9a) acknowledged that to advertise an across-the-board discount in compliance with these requirements "would probably take two pages in the telephone book," and that "[n]obody is going to really advertise in that fashion." *Id.* at 66a.

<sup>4</sup> For example, petitioner disapproved advertisements that offer "20% off new patients with this ad"; "25% discount for new patients on exam x-ray & cleaning/ 1 coupon per patient/ offer expires 1-30-94"; "20% senior citizen discount; 20% military discount"; and "Complete Consultation, Exam and X-rays (if needed) \* \* \* [for only] a \$1.00 charge to you and

Finally, petitioner has made clear that virtually all advertising about quality of services (including the word "quality" itself) is deemed "likely to be false or misleading" because it is not "susceptible to measurement or verification." Pet. App. 74a-75a, 202a-203a; see J.A. 35. Petitioner has also disapproved any advertising that, in its view, implies that a dentist is superior to other dentists. Pet. App. 206a. Such quality claims have been prohibited without regard to whether they are in fact false or misleading. *Id.* at 203a-204a, 207a, 209a. Petitioner and its components have therefore required that members and would-be members eliminate any advertising phrases that refer to the quality of dental care that patients will receive, or indeed to the quality of service ancillary to the actual dentistry, such as punctuality.<sup>5</sup>

Petitioner enforces its advertising restrictions by requiring applicants for membership to submit copies of all of

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your entire family with this coupon" before a certain date. *Id.* at 66a-67a, 90a n.25, 200a-202a. Dentists new to an area who sought to attract patients by advertising a "Grand Opening Special \$5 exam x-ray, \$15 polishing and 40% off dental treatment," or a "get acquainted offer" that "an initial consultation, complete exam, any x-rays and tooth cleaning will be done for only \$5 (applies to all members of your family)" also encountered petitioner's disapproval. *Id.* at 77a n.18.

<sup>5</sup> Thus, petitioner has disapproved such phrases as "personal quality dental care"; "we cater to those people that demand quality, personal attention, and punctuality" (Pet. App. 204a); "you shouldn't have to wait hours or days for dental care" (*id.* at 205a); "my number one concern is your care and comfort"; "You'll appreciate our warm personal attention"; "State of the art dental services" (*id.* at 208a); "dedicated to quality dental care at low cost"; "comfortable and personalized"; "latest equipment and gentle, caring, techniques" (*id.* at 214a); "fully modern . . . luxurious atmosphere" (*id.* at 236a); "all of our handpieces (drills) are individually autoclaved for each and every patient"; and "highest standards in sterilization" (*id.* at 75a). For several years, petitioner disallowed advertising that a dentist offers "gentle" care or "special care for cowards," and many local components continue to proscribe such claims. *Id.* at 76a, 211a-212a.

their own advertising, plus advertisements by their employers and referral services, to the ethics committee of their local dental society. Pet. App. 193a, 237a-239a. Petitioner's local components also publish notices in their newsletters soliciting members to report possible Ethics Code violations by the applicant. *Id.* at 194a. Applicants are denied membership in petitioner if they do not agree to withdraw or revise advertisements that petitioner deems objectionable. *Id.* at 195a-198a. Petitioner also urges its local components to review local Yellow Pages directories for nonconforming advertisements by current members. *Id.* at 194a, 234a-235a. Members who do not agree to revise offending advertisements may be subject to a hearing before petitioner's Judicial Council, and thereafter to censure, suspension, or expulsion. *Id.* at 11a; see *id.* at 56a n.6.

The record in this case compiles actions taken by petitioner and its local societies against nearly 400 dentists, in which petitioner or a component disapproved particular advertising claims by members and applicants for membership, without regard to the truth of such claims. Pet. App. 56a-57a n.6, 89a-90a n.25, 199a-212a, 214a-218a, 235a.<sup>6</sup> Petitioner's efforts to suppress the prohibited advertising have been successful; when forced to choose between a challenged advertisement and membership in petitioner, dentists almost always give up the advertisement. *Id.* at 80a, 235a-237a. Petitioner's restrictions have also had a substantial deterrent effect. Some local societies reported that 90-100% of their members' advertisements complied with petitioner's restraints. *Id.* at 234a-235a.

3. a. On July 9, 1993, the Federal Trade Commission (FTC or Commission) issued an administrative complaint (J.A. 5-

<sup>6</sup> The excerpts of the record filed by the FTC in the court of appeals include an extensive summary of petitioner's disciplinary actions as well as a long list of the words and phrases that petitioner and its components have proscribed. See FTC Supp. E.R., Vol. I, Tab 2, and Vol. II.

16) charging that petitioner had restrained competition among dentists in California by restricting truthful, non-deceptive advertising regarding price and quality of dental services. The complaint alleged that these restraints were "unfair methods of competition" in violation of Section 5 of the Federal Trade Commission Act (FTC Act or Act), 15 U.S.C. 45. After discovery and trial, an Administrative Law Judge (ALJ) concluded that the Commission had jurisdiction over petitioner's activities, and that petitioner had violated Section 5. Pet. App. 159a-265a.<sup>7</sup>

The ALJ determined, upon extensive factual findings (Pet. App. 161a-247a), that petitioner had "successfully withheld from the public information about prices, discounts, quality, superiority of service, guarantees, and the use of procedures to allay patient anxiety." *Id.* at 259a-260a (record citations omitted). He also found that petitioner's "illegal[] conspir[acy]" had "injured those consumers who rely on advertising to choose dentists." *Id.* at 261a-263a.<sup>8</sup>

<sup>7</sup> Although the present case arises under Section 5 of the FTC Act, 15 U.S.C. 45, practices that violate Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, are necessarily "unfair methods of competition" under Section 5, and the Commission relied on Sherman Act principles in addressing the merits of this case. See Pet. App. 53a n.5; *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454-455 (1986).

<sup>8</sup> Petitioner maintains that the ALJ found that its advertising restrictions had "no impact on competition." See Pet. Br. 2, 6-7, 13, 15, 27, 41-42; Pet. App. 246a. In context, however, it appears that the ALJ was quoting the testimony of petitioner's own expert witness, and was not adopting that testimony as his own factual finding. See *ibid.* Indeed, the ALJ noted that this witness "has no expertise in, nor has he made any study of, the economic aspects of the dental market or dental advertising." *Id.* at 244a. Even if the ALJ did credit that witness's testimony on the impact of competition (see *id.* at 83a n.22), the Commission rejected such a conclusion and found that competition was harmed by petitioner's restrictions, *ibid.*; see pp. 10-11, *infra*, and the court of appeals upheld the Commission's finding as supported by substantial evidence, see pp. 12-13, *infra*; Pet. App. 23a-24a.

The ALJ did rule that petitioner lacked “market power,” *id.* at 261a, but that conclusion was based on the legal premise (later rejected by the Commission, *id.* at 83a) that such power exists only in the presence of “insurmountable” barriers to entry, *id.* at 262a. And the ALJ rejected petitioner’s arguments of “procompetitive” effects flowing from its restrictions. He found that petitioner’s ethics code, as actually enforced, “unjustifiably banned whole categories of advertisements which are not false or misleading in a material respect,” and reflected “a hostility toward advertising by its members even if it is truthful and nondeceptive.” *Id.* at 259a-260a.

b. On plenary review of the ALJ’s initial decision (see 16 C.F.R. 3.54(a)-(b)), the Commission affirmed the ALJ’s finding of a violation of Section 5. Pet. App. 43a-158a. The Commission first found (*id.* at 47a-52a) that petitioner was subject to the FTC Act as a corporation “organized to carry on business for its own profit or that of its members,” within the meaning of Section 4 of the Act, 15 U.S.C. 44. Noting that it had previously rejected the argument that the term “profit” in this context should be limited to “direct gains distributed to \* \* \* members,” the Commission held that it had jurisdiction in this case because a substantial portion of petitioner’s activities consists of practice management, marketing, public relations, lobbying, and other business-related services that confer “pecuniary benefits” on its members. *Id.* at 49a, 51a-52a.

On the merits, the Commission concluded that petitioner’s advertising restrictions, both price-related and quality-related, constituted unlawful restraints of trade. Pet. App. 58a-92a. The Commission found, upon its review of the record, that “advertising is important to consumers of dental services and plays a significant role in the market for dental services.” *Id.* at 60a; see *id.* at 76a-77a. As for the price advertising restrictions specifically, the Commission upheld

the ALJ’s findings that petitioner had barred its members from advertising “low” or “reasonable” fees, and had effectively precluded truthful across-the-board discount offers. *Id.* at 63a-67a. The Commission also found that these restrictions on price advertising “constitute[d] a naked attempt to eliminate price competition,” accomplished through the “indirect means of suppressing advertising” about prices. *Ibid.* Based on those findings, the Commission held that petitioner’s price-related restraints were unlawful *per se*. *Ibid.*; see *id.* at 60a-63a, 67a-73a.

The Commission also applied the antitrust rule of reason to all the advertising restrictions at issue in this case. Pet. App. 73a-92a. After observing that this Court “has made clear that the rule of reason contemplates a flexible enquiry, examining a challenged restraint in the detail necessary to understand its competitive effect,” *id.* at 74a (citing *NCAA v. Board of Regents*, 468 U.S. 85, 103-110 (1984)), the Commission found (*ibid.*) that application in this case of the rule of reason could be “simple and short,” because “[t]he anticompetitive effects of [petitioner’s] advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion.” But, the Commission added (*ibid.*), “in any event, [petitioner] clearly had sufficient power to inflict competitive harm.”

The Commission began its rule of reason analysis by assessing the anticompetitive effects of the restrictions. Pet. App. 74a-78a. Supplementing its earlier findings (under the *per se* rule analysis) of the effects of petitioner’s restrictions on price advertising, *id.* at 73a-74a, the Commission found that petitioner had also proscribed a “vast” range of nonprice advertising, barring virtually all claims regarding quality, regardless of the truthfulness of such claims. *Id.* at 74a-76a. It found “substantial evidence” that the challenged advertising restraints “prevented the dissemination of information

important to consumers," regarding both price and nonprice aspects of the dental services offered. *Id.* at 76a-77a. And it found that the restraints "hamper dentists in their ability to attract patients," particularly dentists new to an area. *Id.* at 78a. The Commission therefore concluded that, because of the importance of advertising to consumers in choosing dentists (*id.* at 60a, 77a), petitioner's broad bans would "deprive consumers of information they value and of healthy competition for their patronage." *Id.* at 78a. Although it did not "quantify[] the increase in price or reduction in output occasioned by these restraints," the Commission found their "anticompetitive nature" to be "plain." *Ibid.*

The Commission also found that petitioner had the "power to cause harm to consumers" by inducing its members to withhold information. Pet. App. 80a. It had "little doubt" that petitioner had "the ability to police, and entice its members to adhere to, the restrictions on advertising." *Ibid.* Moreover, it found that "the services offered by licensed dentists have few close substitutes," that "the market for such services is a local one," and that petitioner's members command "more than a substantial share of these markets" —75% of practicing dentists statewide, and more than 90% in one region. *Id.* at 82a. Contrary to the ALJ's conclusion (*id.* at 261a), the Commission found that there are "significant barriers to entry" into those markets, *id.* at 82a-84a, even if they are not "insurmountable," *id.* at 83a. Accordingly, the Commission found that petitioner "possesses the necessary market power to impose the costs of its anti-competitive restrictions on California consumers of dental services." *Id.* at 84a.

Like the ALJ, the Commission rejected petitioner's contention that its restraints were either harmless or pro-competitive. Pet. App. 84a-89a. The Commission acknowledged that the prevention of false and misleading advertising is a "laudable purpose," but it concluded that "the record

will not support the claim that [petitioner's] actions [were] limited to advancing that goal." *Id.* at 84a. It found, rather, that petitioner's "broad categorical prohibitions" (*id.* at 87a) were enforced "without any enquiry as to how [prohibited claims] might be construed by consumers and whether, as construed, they are true of the particular practitioner making the claim" (*id.* at 86a). And it perceived "no convincing argument, let alone evidence" that "consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising" that petitioner restricts. *Id.* at 89a.

The Commission therefore held that petitioner's advertising restrictions violated Section 5 of the FTC Act. Pet. App. 90a-91a. The Commission's cease-and-desist order prohibits those restrictions (*id.* at 27a-31a), but expressly provides that petitioner may "adopt[] \* \* \* and enfor[e] reasonable ethical guidelines governing the conduct of its members with respect to representations that [petitioner] reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act." *Id.* at 30a.

4. The court of appeals affirmed. Pet. App. 1a-24a. As to jurisdiction, the court agreed with the FTC and with other courts that Congress "did not intend to provide a blanket exclusion for nonprofit corporations" from the reach of the FTC Act, and it approved the Commission's approach of "looking at whether the organization provides tangible, pecuniary benefits to its members" in order to determine whether it is a "corporation" subject to the Commission's jurisdiction. *Id.* at 15a-16a. Under that standard, the court was "confident that the facts of this case support the FTC's jurisdiction." *Id.* at 16a.

As to the merits, although the court acknowledged "some support" in case law for the FTC's *per se* analysis of petitioner's restrictions on price advertising, it concluded that a rule of reason analysis is more appropriate for all aspects of

petitioner's advertising restraints. Pet. App. 17a-18a. It then observed approvingly that the FTC had applied "an abbreviated, or 'quick look' rule of reason analysis" in this case because petitioner's restraints "are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry." *Id.* at 18a (citing *NCAA, supra*).

The court first noted that "[r]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price." Pet. App. 19a. On the other hand, the court found no reason to give petitioner's proffered justifications for its disclosures more than a "quick look," because, "[i]n practice," under petitioner's disclosure requirements, it was "simply infeasible to disclose all of the information that is required," and there was "no evidence that [petitioner's] rule has in fact led to increased disclosure and transparency of dental pricing." *Ibid.*

Second, the court concluded that petitioner's restrictions on non-price advertising restricted the supply of information available to consumers, thereby "prevent[ing] dentists from fully describing the package of services they offer, and thus limit[ing] their ability to compete." Pet. App. 19a-20a. The court further suggested that the restrictions "are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services." *Ibid.* It rejected petitioner's contention that its restrictions were justified because of the potential for deception, for even that potential "does not justify banning all quality claims without regard to whether they are, in fact, false or misleading." *Id.* at 20a.

Finally, the court rejected petitioner's contentions that the FTC's findings were not supported by substantial evidence. Pet. App. 20a-24a. In particular, the court ruled that substantial evidence supports the FTC's finding that petitioner had banned categories of advertising without regard to whether they were false or deceptive. *Id.* at 21a-23a. It

also upheld the FTC's finding that petitioner "possesses enough market power to harm competition" through its restraints on advertising. *Id.* at 24a. The court accordingly affirmed the Commission's opinion and enforced its order that petitioner cease and desist from restricting "truthful and non-deceptive advertisements." *Ibid.*

#### SUMMARY OF ARGUMENT

I. A. The Federal Trade Commission properly exercised jurisdiction over petitioner, even though it is formally a non-profit corporation, because a substantial portion of its activities engenders economic benefits for its profit-seeking members. Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, which sets forth the entities subject to the Commission's jurisdiction, reaches not only conventional business enterprises but also any association "organized to carry on business for its own profit or that of its members." The FTC has consistently interpreted that statute, adhering to ordinary definitions of the term "profit," to reach trade associations that engage in activities for the economic benefit of their profit-making members, even where the association itself is organized as a nonprofit entity and the benefits to members take forms other than cash disbursements. The legislative history of the FTC Act evinces Congress's intent to authorize FTC jurisdiction over such associations, and the FTC and the courts have long acted on the understanding that the Act does in fact reach such associations.

B. There is no basis in the statute for an implied, blanket exemption of associations representing profit-making professionals. Petitioner's arguments based on Congress's ostensible lack of attention to professionals when it enacted the FTC Act fail for the same reasons that the Court rejected an implied exemption of professionals from the antitrust laws in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Since that ruling, the FTC has enforced the Act to protect the

public from anticompetitive and deceptive practices in which professional associations have engaged.

C. The FTC's interpretation of the statute's reach—which is based on the provision of substantial economic benefits to an association's profit-seeking members—is reasonable and merits judicial deference. The record amply supports the FTC's application of that standard to petitioner, which generates significant economic benefits for its members through its provision of services to its members and its lobbying, public relations, and marketing activities designed to increase their profitability.

II. A. The FTC and the court of appeals engaged in a proper and sufficient analysis of petitioner's advertising restraints under the antitrust rule of reason. This Court has repeatedly emphasized the flexibility of the rule of reason; it has instructed that the rule's application may be tailored to the circumstances of particular cases, and that elaborate industry analysis is not necessary in all cases to condemn a restraint of trade as unreasonable. The Commission carefully considered here all relevant aspects of a rule of reason analysis and concluded, based on a substantial record, that petitioner's advertising restrictions harmed consumers.

B. The Commission found, based on a substantial evidentiary record, that petitioner's advertising restrictions, as enforced, proscribe a vast range of truthful advertising claims regarding price and quality. The Commission's findings regarding the actual effects of the restrictions belie petitioner's assertion that its disclosure requirements would prompt dentists to provide more information to consumers. Recognizing the indispensable role of advertising in a free enterprise system, the Commission found that the price and quality advertising suppressed by petitioner would be important to consumers in choosing dental services, and that its absence deprives consumers of information they value and of healthy competition for their patronage. Although

petitioner disparages the value of the information at issue, this Court made clear in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), that competitors are not entitled to preempt the working of the market by deciding in concert what information will be made available to consumers, and that the concerted withholding of information valued by consumers may be condemned even absent proof that it resulted in higher prices.

C. The Commission carefully considered petitioner's proffered "procompetitive" justifications for its restrictions, and properly found them lacking. The Commission found that petitioner's disclosure requirements do not, in fact, result in more information to consumers, and found no basis for petitioner's contention that a ban on quality claims was necessary to avoid deception. Unlike the carefully tailored state restrictions that this Court has accepted in the context of First Amendment challenges, petitioner banned broad categories of advertising without regard to whether the banned claims were truthful or nondeceptive. The Commission properly rejected such a blanket restriction on information that consumers desire as an unreasonable restraint of trade.

D. Given the Commission's findings concerning the actual anticompetitive effects of petitioner's restraint, it was not required to engage in a further analysis of market power. It nevertheless did so, concluding first that petitioner has the ability to require members to adhere to its advertising restrictions (due to the high value placed on membership), and second that petitioner has the power to inflict the anticompetitive effects of those restrictions on California consumers. It also pointed to the substantial percentage of California dentists who comply with petitioner's restrictions, as well as substantial barriers to sufficient entry of new dentists. Those findings were sufficient for this case; the Commission was not required to engage in elaborate indus-

try analysis that may be required in other contexts, such as merger cases.

## ARGUMENT

### I. THE COMMISSION PROPERLY EXERCISED JURISDICTION OVER PETITIONER BECAUSE ITS ACTIVITIES, IN SUBSTANTIAL PART, PROVIDE PECUNIARY BENEFITS FOR ITS MEMBERS

Congress has empowered the FTC to prevent “persons, partnerships, or corporations” from engaging in unfair methods of competition and unfair or deceptive acts and practices in or affecting commerce. 15 U.S.C. 45(a)(2). The FTC Act defines “corporation” broadly, in Section 4, to include not only companies with capital stock, but also “any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, \* \* \* which is organized to carry on business for its own profit or that of its members.” 15 U.S.C. 44. In this case, the FTC, applying its long-standing administrative interpretation of Section 4, properly concluded that petitioner is subject to the FTC Act’s reach as an association “organized to carry on business for [the] profit \* \* \* of its members” because a substantial part of its activities engenders a pecuniary benefit for its profit-seeking members. Pet. App. 49a, 51a-52a.

#### A. The Text, Legislative History, and Enforcement History of the FTC Act Support the Commission’s Exercise of Jurisdiction Over Nonprofit Associations That Engender Pecuniary Benefits For Their Members

The text of the FTC Act shows a congressional purpose to grant the FTC broad authority over companies and associations. The language of Section 4 is expansive. Section 4 extends the ordinary meaning of “corporation” to include “any” association “organized to carry on business for its own profit or that of its members,” even if unincorporated and

lacking such hallmarks of a profit-making enterprise as “shares of capital or capital stock or certificates of interest.” As long as the association carries on business “for [the] profit \* \* \* of its members,” it is subject to the Act’s prohibitions against unfair methods of competition and deceptive Acts and practices. 15 U.S.C. 44.

The pivotal question in this case is whether an association may be said to work for the “profit” of its members, even if it does not distribute earnings to them. Petitioner argues (Br. 19-21) that Section 4 uses the term “profit” in the limited sense of the “excess of revenues over investment or expenses.” Thus, it contends, to be within the reach of the FTC Act, an association must itself earn and pay such “profits” (i.e., the excess of its *own* revenues over expenses) to its members.

Even if the Act did use the term “profit” in the limited sense of the excess of revenues over expenses, that would not advance petitioner’s jurisdictional argument. Petitioner’s activities are intended to, and do, increase the revenues and decrease the expenses of its members, who are “independent competing entrepreneurs” (*Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 357 (1982)). Petitioner’s activities help its members achieve profitability. Thus, petitioner carries on business for its members’ “profit,” even if it does not distribute its own earnings to them. Nothing in logic or the text of Section 4 suggests that the only way an organization may carry on business to help its members achieve profits is to distribute its own earnings to the members.

Moreover, “profit” is, and long has been, commonly used to refer more broadly to economic benefit. When the FTC Act was passed in 1914, a standard dictionary defined “profit” to include “[a]ccession of good; valuable results; useful consequences; benefit; avail; gain; as, an office of *profit*.” *Webster’s International Dictionary* 1713 (def. 2) (1913); see also 2 S. Rapalje & R. Lawrence, *A Dictionary of American*

and English Law 1020 (1883) (“In its primary sense, profit signifies advantage or gain in money or in money’s worth.”). Modern definitions are similar. See *Webster’s Third New International Dictionary* 1811 (def. 2) (1986). And Congress has frequently used “profit” and “for profit” in statutes to refer to pecuniary benefit generally, rather than in the limited sense of the excess of earnings over expenses and investment.<sup>9</sup> The language of Section 4 thus comfortably reaches associations that work for their profit-seeking members’ economic benefit, even if they do not distribute earnings to the members.

Petitioner submits (Br. 21 n.5) that any “genuine nonprofit entity” should be outside the reach of the Act. A “genuine nonprofit entity,” however, may well conduct activities that are intended to be, and are, for the economic benefit of its members. Trade associations, for example, frequently work to advance their members’ economic interests and provide them with benefits of substantial value, even though such associations are genuinely nonprofit in that their revenues are not distributed to their members, and even though such entities (like petitioner) may be entitled to exemption from federal income tax under 26 U.S.C. 501(c)(6).<sup>10</sup>

<sup>9</sup> See, e.g., 7 U.S.C. 1a(5)(A)(i) (defining “commodity trading advisor” as one who, “for compensation or profit,” advises others on commodity trading); 7 U.S.C. 2132(f) (defining animal “dealer” as one who “for compensation or profit” delivers animals for sale); 8 U.S.C. 1375(e)(1)(A) (Supp. II 1996) (defining “international matchmaking organization” as one that offers matrimonial services “for profit”); 18 U.S.C. 1170(a) (punishing one who “uses for profit” any Native American human remains without the right of possession); 42 U.S.C. 3604(e) (punishing one who, “[f]or profit,” induces another to sell or rent a dwelling based on changes in racial composition of neighborhood); see also 12 U.S.C. 2802(4); 18 U.S.C. 31; 18 U.S.C. 921(a)(21); 18 U.S.C. 1466(b); 42 U.S.C. 2205(b); 50 U.S.C. 217.

<sup>10</sup> Petitioner (Br. 20 n.4) and amici (ASAE Br. 10, ADA Br. 15) argue that, to qualify as tax-exempt under Section 501(c)(6), they had to satisfy that Section’s requirement that “no part of [their] net earnings \* \* \*

The legislative history of the FTC Act demonstrates, moreover, that Congress considered the coverage of nonprofit associations (especially, nonprofit associations of entrepreneurs) and decided to include such entities within the Act’s reach. When Congress was considering legislation to replace the Bureau of Corporations with the Federal Trade Commission, both the House and the Senate initially passed bills that would have defined “corporation” to refer only to incorporated, joint-stock, and share-capital companies organized to carry on business for profit. See H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 11, 14 (1914). Two days after the Senate passed its version of the legislation, Bureau of Corporations Commissioner Davies wrote to Senator Newlands, the bill’s sponsor and a member of the Conference Committee, expressing concern about its definition of “corporation.” Davies explained that the bill would prevent the new Commission from acting against trade associations that “purport to be organized *not for profit*,” and that, although “[a]s to some of the things done by these associations, no

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inure[] to the benefit of any private shareholder or individual,” which (they contend) necessarily means that they do not operate for the profit of their members. Under Section 501(c)(6), however, it is generally permissible for a trade association’s activities to “improve[] the business conditions” of the industry as a whole, including its members, as long as such benefits are not *confined* to the association’s members. See *National Muffler Dealers Ass’n v. United States*, 440 U.S. 472, 482-484 (1979); *MB, Inc. v. Commissioner*, 734 F.2d 71, 76 & n.3 (1st Cir. 1984); 26 C.F.R. 1.501(c)(6)-1. Indeed, as Section 501(c)(6) is confined to entities with common business interests (as opposed to charities, which are covered elsewhere), that Section presupposes the promotion of an industry’s economic interests. Furthermore, there are significant differences between the purposes and operation of the revenue laws and the FTC Act. Cf. *FTC v. Bunte Bros.*, 312 U.S. 349, 353 (1941) (“Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business.”). The fact that an entity might be considered nonprofit for tax purposes does not necessarily mean that it is outside the broad enforcement reach of the FTC Act.

question as to their propriety can be raised," such associations nonetheless "furnish convenient vehicles for common understandings looking to the limitation of output and the fixing of prices contrary to the law."<sup>11</sup> The Conference Committee subsequently revised the definition of "corporation" in Section 4 specifically to include associations lacking capital stock that are organized to carry on business for their own profit or that of their members. *Id.* at 3. That alteration of the statutory text shows that Congress intended the Act to reach nonprofit entities, including trade associations, if they work to advance their members' economic interests.

The FTC and the courts have consistently read the FTC Act in conformity with Congress's intent to cover trade associations advancing the economic interests of their members. From its earliest days, the FTC has exercised its jurisdiction over anticompetitive practices by nonprofit associations whose activities provided substantial economic benefits to their for-profit members' businesses, even though the associations did not themselves engage in manufacturing or retailing, and did not distribute earnings to members.<sup>12</sup> The courts soon confirmed that "[t]he language of the act affords no support for the thought that individuals, partnerships, and corporations can escape restraint, under the act, from combining in the use of unfair methods of competition, merely because they employ as a medium therefor an unincorporated voluntary association, without capital and not itself engaged in commercial business." *National Harness Mfrs. Ass'n v. FTC*, 268 F. 705, 709 (6th Cir. 1920); see also

<sup>11</sup> *Trade Commission Bill: Letter from the Commissioner of Corporations to the Chairman of the Senate Comm. on Interstate Commerce, Transmitting Certain Suggestions Relative to the Bill (H.R. 15613) to Create a Federal Trade Commission*, 63d Cong., 2d Sess. 3 (1914).

<sup>12</sup> See, e.g., *FTC v. Association of Flag Mfrs.*, 1 F.T.C. 55 (1918); *FTC v. United States Gold Leaf Mfrs. Ass'n*, 1 F.T.C. 173 (1918); *FTC v. Bureau of Statistics of the Book Paper Mfrs.*, 1 F.T.C. 38 (1917).

*Chamber of Commerce v. FTC*, 13 F.2d 673, 684 (8th Cir. 1926). Following these decisive early rulings, the FTC and reviewing courts (including this Court) have consistently acted on the understanding that nonprofit trade associations are within the FTC's jurisdiction.<sup>13</sup> More recently, when the FTC took action against a nonprofit association for misrepresenting that no scientific evidence linked cholesterol in eggs to increased risk of cardiovascular disease, the Seventh Circuit held that the group, which was "formed to promote the general interests of the egg industry," came within the definition of "corporation" in Section 4 because it "was organized for the profit of the egg industry, even though it pursues that profit indirectly." *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485, 487-488 (1975) (internal quotation marks omitted), cert. denied, 426 U.S. 919 (1976).<sup>14</sup>

<sup>13</sup> See, e.g., *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Millinery Creator's Guild, Inc. v. FTC*, 312 U.S. 469 (1941); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941); *FTC v. Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927); *Standard Container Mfrs. Ass'n v. FTC*, 119 F.2d 262 (5th Cir. 1941); *California Lumbermen's Council v. FTC*, 115 F.2d 178 (9th Cir. 1940), cert. denied, 312 U.S. 709 (1941).

<sup>14</sup> Petitioner relies heavily (Br. 16-19) on the Eighth Circuit's decision in *Community Blood Bank v. FTC*, 405 F.2d 1011 (1969), which, it contends, supports its narrow reading of the term "profit." That decision, however, is consistent with the approach to Section 4 explained above. There the court of appeals rejected the theory that a community blood bank—which it found to be organized for "only charitable purposes"—could be said to earn "profit" by virtue of its retention of earnings "for its own self-perpetuation or expansion." *Id.* at 1016, 1022. Nonetheless, the court recognized that Section 4 does not "provide a blanket exclusion of all nonprofit" entities. *Id.* at 1017. It acknowledged Congress's intent to confer on the Commission jurisdiction over "trade associations," and emphasized the need for an "ad hoc" inquiry focusing on the facts of the particular organization. *Id.* at 1017-1019. Most significantly, it had no occasion to address the status of an entity, like the present petitioner, that is organized as a nonprofit corporation but whose activities provide pecuniary benefits to profit-seeking members. See also *FTC v. Freeman Hosp.*, 69

Despite that lengthy history of FTC enforcement actions (upheld by the courts) against nonprofit organizations, petitioner argues (Br. 24-25) that Congress's *failure* to act on a proposed amendment to the FTC Act in 1977 demonstrates that Congress did not intend, in 1914, to bring such organizations within the reach of the Act. This Court has frequently characterized such reliance on congressional inaction as "a particularly dangerous ground on which to rest an interpretation of a prior statute." *Central Bank v. First Interstate Bank*, 511 U.S. 164, 187 (1994); see *FTC v. Dean Foods Co.*, 384 U.S. 597, 608-611 (1966). Congress's failure to take action on the 1977 proposal in fact reveals little about the matter at hand, because that proposal would have given the FTC jurisdiction even over wholly charitable institutions; the Act, as amended, would not have been limited to nonprofit institutions that advance their members' pecuniary interests.<sup>15</sup> Congress may have declined to amend the Act because it was satisfied with the existing state of the case law, which (then as now) allowed the FTC to exercise jurisdiction over nonprofit associations such as petitioner that advance their members' pecuniary interests (even if they do not distribute earnings to members), but not over wholly charitable institutions.<sup>16</sup> Accordingly, no reliable guidance

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F.3d 260, 266 (8th Cir. 1995) (reading *Community Blood Bank* as holding that only genuine charitable organizations are outside Section 4).

<sup>15</sup> The proposal would have amended the definition of "person, partnership, or corporation" in Section 4 "to include any individual, partnership, corporation, or other organization or legal entity." See H.R. 3816, 95th Cong. (1977), reprinted in *Federal Trade Commission Amendments of 1977 and Oversight: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 4, 27-28 (1977) (1977 House Hearing). The proposal therefore would have overruled the Eighth Circuit's decision in *Community Blood Bank*, *supra*.

<sup>16</sup> Compare *Community Blood Bank*, *supra*, with *National Comm'n on Egg Nutrition*, *supra*; see also 1977 House Hearing, *supra*, at 82

can be gleaned from Congress's failure to enact legislation in 1977. Cf. *Consumer Prod. Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 116-120 (1980); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968).

**B. There Is No Basis In The Statute For A "Professional Association" Exemption**

Petitioner argues (Br. 16) that, even if some nonprofit entities advancing members' economic interests (such as associations of automobile dealers or retail grocers) fall within the reach of the FTC Act, *professional* associations like itself nonetheless do not. The text of the statute, however, will not support any implied, blanket "professional association" exception. A voluntary nonprofit association of professionals may be organized (and legitimately so) to advance its members' economic interests even if it *also* engages in public service activities and monitoring of its members' ethics. Many associations of professionals (as well as other entrepreneurs) engage in both kinds of activities. See, e.g., *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 682 (1978). As the Court explained in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975), it is "no disparagement of \* \* \* a profession to acknowledge that it has [a] business aspect." Dentists no less than industrialists may come to

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(testimony by FTC Chairman Collier that *Community Blood Bank* decision "affirmed the Commission's jurisdiction over nonprofit corporations whose activities redound to the economic benefit of their shareholders or members").

We also note that, in 1982, Congress failed to pass an amendment reported out of a Senate committee that would have terminated the FTC's jurisdiction over all state-licensed professionals and their associations. See S. Rep. No. 451, 97th Cong., 2d Sess. 5-7, 34-35 (1982). Under petitioner's logic, that refusal to take action could be taken as evidence that Congress approved of the FTC's actions in this area, especially since the minority on the committee observed that "the long list of FTC actions in this area is clearly pro-consumer and pro-competition." *Id.* at 49.

gether in a voluntary nonprofit association to advance their economic interests as a group. It is also difficult to see how any clear line could be drawn between classes of "professionals" and "non-professionals" for the purpose of defining the FTC's jurisdiction.

Petitioner suggests (Br. 24) that Congress must have intended to exclude professional associations from the FTC Act's reach because the professions were not regarded as subject to the antitrust laws when the Act was passed. This Court in *Goldfarb* rejected the similar argument that the business activities of "learned professions" were beyond the Sherman Act's reach because such professions were not regarded as "trade or commerce" when that Act was enacted. 421 U.S. at 787-788. Given the broad language of coverage used in Section 4 of the FTC Act, its reach cannot be frozen by assumptions in 1914 any more than the Sherman Act has been confined by assumptions extant in 1890. And whether or not Congress contemplated at its enactment that the FTC Act (or the Sherman Act) would be used against organizations of professionals such as dentists and lawyers, this Court "frequently has observed that a statute is not to be confined to the particular applications contemplated by the legislators." *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) (internal quotation marks, brackets, and ellipsis omitted).

Since this Court made clear in *Goldfarb* that combinations of professionals in restraint of trade are indeed subject to the antitrust laws, the FTC has consistently acted to protect the public from anticompetitive practices of professional associations. It has brought enforcement actions against organizations that were fixing or stabilizing prices,<sup>17</sup>

<sup>17</sup> See, e.g., *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *Empire State Pharm. Soc'y*, 114 F.T.C. 152 (1991) (boycotts against third-party payers that attempted to obtain lower prices for prescriptions).

thwarting cost containment programs,<sup>18</sup> and blocking the development of health maintenance organizations.<sup>19</sup> It has also acted against deceptive advertising and promotion by professional associations, such as misrepresentation of their members' expertise.<sup>20</sup> Petitioner's submission that such organizations are exempt from the FTC Act would deprive the public of the important consumer protection provided by Section 5 against such unfair competition and deceptive practices.<sup>21</sup>

**C. The Commission's Construction Of Its Jurisdiction Under The FTC Act Is Entitled To Deference, And Its Application Of That Construction In This Case Was Proper**

For the reasons we have stated, the text of the FTC Act does not support a construction exempting all nonprofit (or professional) associations. At a minimum, the text does not compel such a construction. Since the word "profit" is cap-

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<sup>18</sup> See, e.g., *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *Michigan State Med. Soc'y*, 101 F.T.C. 191 (1983); *Indiana Dental Ass'n*, 93 F.T.C. 392 (1979).

<sup>19</sup> See, e.g., *Forbes Health Sys. Med. Staff*, 94 F.T.C. 1042 (1979); *Medical Serv. Corp.*, 88 F.T.C. 906 (1976).

<sup>20</sup> See, e.g., *FTC v. National Energy Specialist Ass'n*, No. 92-4210, 1993 WL 183542 (D. Kan. Apr. 29, 1993).

<sup>21</sup> Petitioner points out that, even if it is exempt from the FTC Act, it will still be subject to antitrust scrutiny by the Department of Justice under the Sherman and Clayton Acts. The same cannot be said, however, of the FTC's authority under Section 5 to prevent deceptive practices, for which there is no analogue in the antitrust laws. Petitioner's argument would leave the FTC without authority to proceed against nonprofit trade and professional associations that disseminate false information about their members' services or products. Cf. *National Comm'n on Egg Nutrition*, *supra* (FTC Act used to prevent dissemination of false information about health effects of cholesterol in eggs); *American Dairy Ass'n*, 83 F.T.C. 518 (1973) (consent order against misrepresenting fat content or caloric value of milk).

able of the construction that the FTC has placed on its encompassing the situation in which a nonprofit organization works to advance its members' economic interests, even if it does not distribute earnings to them—that construction is entitled to deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring) (Chevron deference applicable to agency's interpretation of its own statutory authority or jurisdiction); see, e.g., *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89 (1995) (deferring to NLRB's interpretation of who is an "employee" covered by National Labor Relations Act). Deference is particularly appropriate because the FTC has consistently acted on the view that Section 5 reaches such nonprofit associations since shortly after the FTC Act was passed. See p. 20, *supra*; *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-458 (1978).

It bears emphasis that the Commission does not read the FTC Act as reaching *all* nonprofit associations but (consistent with the Act's requirement of "profit") only those organizations "whose activities engender a pecuniary benefit to [their] members if [those] activit[ies] are] a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." Pet. App. 49a (quoting *American Med. Ass'n*, 94 F.T.C. 701, 983 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982) (*AMA*));<sup>22</sup> see also *College Football Ass'n*, 117 F.T.C. 971, 1000-1008 (1994) (FTC's

<sup>22</sup> With respect to the Court's affirmation in the *AMA* case, we note that, when it reached this Court, that case presented not only the jurisdictional question, but also the propriety of the FTC's entry of a prospective cease-and-desist order in light of ethical-rule changes adopted by the *AMA* after the filing of the administrative complaint. See 80-1690 FTC Br. I, 46-59.

determination that it lacked jurisdiction over nonprofit organization engaged in commercial activity for its members' benefit because its members were not profit-seeking). There is no basis, therefore, for the suggestion that the FTC's reading of the Act will expand its jurisdiction beyond its proper reach, to the realm of purely eleemosynary institutions.<sup>23</sup> Rather, the Commission has sensibly read the Act as permitting it to intervene when a nonprofit entity advances its members' economic interests in the commercial world.

Petitioner's argument (Br. 19) that it falls outside the statute's reach because its "main purpose" is to promote dental health lacks textual support. The statute applies by its terms to entities that conduct business for the profit of their members, and makes no exception for ones that *also* conduct activities for the benefit of the public. Furthermore, drawing a jurisdictional line based on an association's "primary" purpose would create serious difficulties as to the proper classification of an organization's activities (particularly those with both public and private benefits) as well as the weights to be assigned to them (e.g., weighing by amount of expenditure or by degree of pecuniary benefit conferred).

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<sup>23</sup> Amicus American College for Advancement in Medicine (ACAM) cites the FTC's investigation into its activities as evidence that the FTC has wrongly asserted jurisdiction over a purely eleemosynary medical society (Br. 1, 3). (The IRS master list of exempt organizations reveals that ACAM is a Section 501(c)(6) business league, not a Section 501(c)(3) charity.) On December 8, 1998, ACAM agreed to settle the FTC's charges that it made false and unsubstantiated advertising claims regarding EDTA chelation therapy for treating coronary artery disease; ACAM has agreed not to make any representation about the efficacy of such chelation therapy unless supported by competent and reliable evidence. See *FTC, Current News Releases* (Dec. 8, 1998) <http://www.ftc.gov> (copies of complaint and proposed settlement); see also *Quackery: A \$10 Billion Scandal: Hearing Before the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 98th Cong., 2d Sess. 96-98 (1984); *United States v. Evers*, 643 F.2d 1043, 1045-1046 (5th Cir. 1981).

Such a line could also encourage associations to attempt to evade jurisdiction through creative accounting classifications of their expenditures. The FTC was therefore justified in construing the Act's reach to turn on the existence of a substantial pecuniary benefit to an organization's members, rather than on the nature of its primary activities.

The record also amply supports the FTC's application of that standard in this case. Given petitioner's emphasis on the economic benefits that it provides to its members (see pp. 2-3, *supra*), the services that it offers in competition with for-profit businesses (including training programs, job placement, legal services, and low-cost insurance through its for-profit subsidiaries) (see p. 2, *supra*; J.A. 20-23), and its lobbying on behalf of its members' pocketbook issues (*ibid.*), there is substantial evidence to support the FTC's conclusion that petitioner provides its members with "substantial pecuniary benefits." Accordingly, the FTC properly concluded that petitioner is subject to the Act.

## **II. THE COMMISSION CORRECTLY CONCLUDED THAT PETITIONER'S ADVERTISING RESTRICTIONS CONSTITUTE AN UNREASONABLE RESTRAINT OF TRADE**

Section 1 of the Sherman Act, 15 U.S.C. 1, prohibits unreasonable restraints of trade. See *Standard Oil Co. v. United States*, 221 U.S. 1, 65 (1911). Restraints that "always or almost always tend to restrict competition and decrease output" are deemed unreasonable *per se*. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-290 (1985); see *Northern Pacific v. United States*, 356 U.S. 1, 5 (1958). Other restraints are subject to the "rule of reason," which seeks to distinguish between a restraint that "merely regulates and perhaps thereby promotes competition" and one that "may suppress or even destroy competition." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 n.15 (1977) (internal quotation marks

omitted). In all cases, however, the purpose of the antitrust inquiry is "to form a judgment about the competitive significance of the restraint." *NCAA v. Board of Regents*, 468 U.S. 85, 103 (1984) (internal quotation marks omitted).

Agreements among members of a professional association that govern the way in which members compete with one another are horizontal restraints of trade. *National Soc'y of Prof. Eng'r's v. United States*, 435 U.S. 679, 692 (1978). In this case, the Commission carefully examined petitioner's restraints in light of their surrounding circumstances and an extensive factual record that had been compiled about their actual effect. Pet. App. 73a-92a. It found that petitioner applied its advertising rules to ban systematically a "vast" range of advertising valued by consumers, depriving them of truthful, nondeceptive information about the price and quality of dental services. *Id.* at 74a. It also concluded that the restraints significantly interfered with the proper functioning of the market and were therefore anticompetitive. *Id.* at 78a. Although the Commission found it unnecessary to quantify the precise consumer injury caused by these restrictions, it sufficiently considered pertinent factors under the rule of reason, including market impact and the ostensibly procompetitive justifications proffered by petitioner. *Id.* at 78a-92a; see *id.* at 20a-24a (consideration of same factors by court of appeals).<sup>24</sup>

Petitioner's primary complaint (Br. 38, 42) is that the Commission failed to make a detailed inquiry into market

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<sup>24</sup> As we have noted (pp. 8-9, *supra*), the Commission concluded that petitioner's bans on price advertising were unlawful *per se*. The Commission pointed (Pet. App. 67a-69a) to substantial support in the case law for such *per se* treatment of advertising restrictions. Although we submit the Commission's use of the *per se* rule was appropriate, especially given its accumulation of experience with advertising restrictions (see *id.* at 71a-72a), the Court need not reach that issue if it agrees with our submission that the Commission's analysis under the rule of reason was sufficient.

structure and into its market power. In fact, the Commission (and the court of appeals) did examine market power, and found that petitioner had the ability to withhold from consumers the valuable information that they seek about dentists' prices and services. See Pet. App. 23a-24a, 79a. The Commission's analysis in this case (and the court of appeals') followed the Court's teachings that the rule of reason may properly be tailored to the circumstances of each case, and does not necessarily require a "detailed market analysis" in every instance. See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986) (*IFD*). By insisting on what it terms a "full rule of reason" analysis in cases such as the present one—including the detailed analysis of matters such as the structure of local geographic markets—petitioner would interpose unjustified barriers to the adjudication of antitrust claims by the Commission and the federal courts. Although an informed judgment about an arrangement's likely competitive effects may in some cases require elaborate efforts to delineate market boundaries, no such detail was needed here to find a substantial restraint on competition. Petitioner's other objections to the FTC's analysis are all attacks on the Commission's factual determinations, which (as the court of appeals ruled, Pet. App. 20a-24a) are amply supported by the record.

**A. The Commission's Analysis In This Case Was Consistent With This Court's Decisions Holding That The Rule Of Reason Requires A Careful Yet Flexible Inquiry Into Competitive Effects, Tailored To The Circumstances Of Each Case**

Antitrust tribunals apply the rule of reason to evaluate the competitive significance of a wide variety of business and trade association practices, which can vary greatly in their complexity, purpose, and effect. For this reason—and in keeping with its common law origins—the rule of reason is "used to give the [antitrust laws] both flexibility and defini-

tion." *Prof. Eng'rs*, 435 U.S. at 688.<sup>25</sup> The Court has emphasized the flexibility of the rule of reason on several occasions, and has instructed that the requirements of analysis under the rule vary according to the circumstances presented. For example, in *NCAA*, *supra*, the Court declined to apply the *per se* rule, but invalidated without detailed market analysis the NCAA's restrictions on televising football games under the rule of reason. The Court rejected on both legal and factual grounds the NCAA's argument that its television plan could not be condemned under the rule of reason because it lacked market power:

As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."

468 U.S. at 109 (quoting *Prof. Eng'rs*, 435 U.S. at 692).

The Court took a similar approach to rule of reason analysis in *IFD*, *supra*, a case quite similar to the present one. There, a state association of dentists had agreed not to provide copies of dental x-rays to insurers, who sought to use them to assess the propriety of the dentists' services and

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<sup>25</sup> This Court's decision in *Professional Engineers* itself displayed the flexibility of the rule of reason. The Court held that the Society's ban on competitive bidding, while not "price fixing as such," "impede[d] the ordinary give and take of the market place," and "deprive[d] the customer of the ability to utilize and compare prices in selecting engineering services." 435 U.S. at 692-693 (internal quotation marks omitted). Under those circumstances, the Court ruled that "no elaborate industry analysis is required" to condemn the bidding ban under the rule of reason. *Id.* at 692. Moreover, the Court did so without a finding of market power. See *id.* at 681-682 (Society had membership of 69,000 of 325,000 registered professional engineers).

arguments in support of the agreement similar to the ones petitioner advances here—namely, “that the Commission’s findings were inadequate because of its failure both to offer a precise definition of the market in which the Federation was alleged to have restrained competition and to establish that the Federation had the power to restrain competition in that market.” *Id.* at 453. Although the Court held that the refusal to provide x-rays did not amount to a *per se* illegal boycott, it nevertheless ruled that “[a]pplication of the Rule of Reason to these facts is not a matter of any great difficulty,” in light of the nature of the restraint and the Commission’s finding of actual effects on competition. *Id.* at 459.

In so ruling, the Court made two points about the role of market power evidence in rule of reason cases. First, some restraints are unlawful under the rule of reason without any proof of market power at all: “absence of proof of market power does not justify a naked restriction on price or output.” *IFD*, 476 U.S. at 460 (quoting *NCAA*, 468 U.S. at 109). Second, other restraints may be shown to be unlawful without extensive market power analysis. As the Court explained, “even if the restriction imposed by the Federation [was] not sufficiently ‘naked’ to call this principle [condemnation without proof of market power] into play, the Commission’s failure to engage in detailed market analysis [was] not fatal to its finding of a violation of the Rule of Reason.” *Ibid.* The Court reasoned that “Federation dentists constituted heavy majorities of the practicing dentists” and that insurers were actually unable to obtain x-rays, *ibid.*, and, therefore, that the restraint had “adverse effects on competition,” *id.* at 461. The Court further reasoned that, even though the purpose of obtaining x-rays was to minimize costs, the restraint was “likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices.” *Id.* at 461-462.

In the present case, the Commission hewed closely to this analysis and to the Court’s teachings “that the rule of reason contemplates a flexible enquiry, examining a challenged restraint *in the detail necessary to understand its competitive effect.*” Pet. App. 74a (citing *NCAA*, 468 U.S. at 103-110) (emphasis added). The Commission referred to its rule of reason analysis as “simple and short” (*ibid.*), which it was, in comparison to the lengthier analysis that may be needed in (for example) a merger case, where it may be necessary to delineate numerous geographic markets. But the Commission—which has extensive experience with the effect of advertising restrictions—reached its finding of a violation of Section 5 only after a careful assessment of the record regarding the actual and likely effects of petitioner’s highly restrictive advertising rules on consumers of dental services in California. See *id.* at 74a-84a. Based on its finding that “the general proposition regarding the importance of advertising to competition carries over to the instant situation,” *id.* at 60a., the Commission reasonably concluded that petitioner’s restrictions on advertising had adverse effects on competition, for an agreement that “limit[s] consumer choice by impeding the ‘ordinary give and take of the marketplace’ cannot be sustained under the Rule of Reason.” *IFD*, 476 U.S. at 459 (quoting *Prof. Eng’rs*, 435 U.S. at 692).<sup>26</sup>

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<sup>26</sup> Arguments advanced by petitioner (Br. 27, 31) regarding the supposed need to confine “quick look” analysis to a “limited class of cases” are therefore based on a misconception of the Commission’s ruling. In giving what it called a “quick look” to petitioner’s restraints, the FTC did not engage in a separate category of antitrust analysis. Rather, it applied the rule of reason in the particular context of advertising restrictions, in which it has considerable expertise. That context permitted it to take into account the well-established, fundamental role of advertising in the proper functioning of a free-market economy. See pp. 36-38, *infra*. Furthermore, consistent with the requirements of rule of reason analysis, the Commission considered the procompetitive justifications offered by petitioner in support of its restraints. See pp. 40-43, *infra*.

Petitioner (Br. 27, 45-46) and amicus NCAA (Br. 11-12) go far afield in urging the Court to establish the contours of the analysis required under the rule of reason for all possible cases. All that is at issue here is whether the restraints on advertising in this case required a more extensive analysis than the Commission afforded them. In asserting the need for a “full rule of reason analysis,” petitioner would have the Court require an exhaustive market analysis *whenever* an antitrust tribunal applies the rule of reason (outside some ill-defined class of restraints in which it concedes that a “quick look” is sufficient, Br. 31). Such a rigid requirement is not required by this Court’s precedents, however, and can stand only as an unnecessary roadblock to a measured and sensible application of the antitrust laws, especially in contexts like the present case, involving extensive suppression of information that consumers find highly useful.<sup>27</sup>

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<sup>27</sup> Petitioner and amicus NCAA elsewhere appear to suggest that virtually *any* proffer of an ostensibly procompetitive effect has the effect of necessitating a “full rule of reason analysis.” Pet. Br. 37-38; NCAA Br. 16-17. The cases on which they rely, however, dealt with restrictions quite unlike those in the present case, which involves the well-understood effects of a suppression of advertising of discounts and comparative price and quality claims. In *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993), the court was presented with novel arguments about the distribution of financial aid to students based on need, and concluded that such arguments required more extensive analysis. See *id.* at 669, 678-679. *Vogel v. American Society of Appraisers*, 744 F.2d 598 (7th Cir. 1984), was an antitrust challenge to an ethical rule against a percentage-based pricing system for appraisals. The court emphasized that the ethical rule appeared to promote, rather than restrict, competition, because “[t]he apparent tendency” of the outlawed pricing system was “to raise, not lower, the absolute level of appraisal fees.” *Id.* at 602. Neither case suggests that an exhaustive market analysis is required whenever a defendant asserts a procompetitive theory.

**B. The Commission Properly Found, Based On Substantial Evidence, That Petitioner’s Advertising Restrictions Had Anticompetitive Effects.**

The Commission engaged in an extensive analysis of the effects of petitioner’s advertising restrictions, and concluded that they harmed competition by “depriv[ing] consumers of information they value and of healthy competition for their patronage.” Pet. App. 78a; see also *id.* at 55a-60a, 63a-67a, 74-77a. That conclusion was based on two intermediate findings. First, the Commission found that the actual effect of petitioner’s restrictions was to suppress a vast range of truthful and nondeceptive advertising. Second, it found that the restraints were harmful to consumers of dental services, because the advertising that was suppressed would have been useful to them in making choices about dental services. Those conclusions are fully supported by the record.

1. As detailed above (pp. 9-10, *supra*), the Commission amassed an extensive record of the ways in which petitioner foreclosed its members from providing useful information about price and quality to consumers. Based on that record, the Commission concluded that petitioner had “effectively preclude[d] its members from making low fee or across-the-board discount claims.” Pet. App. 63a. It also found that “[t]he nonprice advertising CDA proscribed is vast,” and that petitioner had, in practice, “prohibit[ed] all quality claims.” *Id.* at 74a-75a.

These well-supported factual findings refute any notion that petitioner’s onerous disclosure requirements, in particular, could have had the effect of “giv[ing] consumers *more* information, not *less*” (Pet. Br. 34). Although petitioner’s policy concerning the advertising of discounts is superficially couched in terms of disclosure requirements, the Commission found that the *actual* effect of those requirements was “prohibitive” of across-the-board discount advertising. Pet. App. 66a-67a, 85a-86a. In reaching that factual finding, the

Commission employed its expertise—developed in its dual function of protecting consumers against deceptive practices and preventing anticompetitive acts—in evaluating the practical effect of disclosure requirements. As petitioner points out (Br. 34-35), there are circumstances in which disclosure requirements are highly beneficial to consumers, and the FTC does in some cases mandate disclosures to prevent consumer deception. But the FTC is aware (as is this Court, see *Morales v. Trans World Airlines*, 504 U.S. 374, 389-390 (1992)), that excessively burdensome disclosure requirements can have the “paradoxical effect” of stifling information that might benefit consumers. See Pet. App. 66a. The FTC is often called upon to make practical judgments about the actual or likely effects of disclosure requirements, and it properly concluded in this case that petitioner’s requirements were so onerous that they operated in actual effect as a “broad ban” on discount advertising. *Id.* at 67a. Indeed, petitioner appears to concede (Br. 36) the unreasonableness of its requirement that across-the-board discounts on all dental procedures be accompanied by the full litany of mandated disclosures.<sup>28</sup>

2. The Commission also addressed at length the significance to consumers of petitioner’s restraints. It was not just the fact that dissemination of truthful information was forbidden, but particularly the kind of advertising banned—relating to the price and quality of service offered—that

<sup>28</sup> Petitioner nonetheless speculates (Br. 36) that its member dentists, even if effectively (and unreasonably) precluded from advertising across-the-board discounts by its restrictions, should be able to comply with a requirement that advertised discounts on individual services be accompanied by a litany of disclosures. The Commission found, however, that “the truthful offer of a discount from the price ordinarily charged by a dentist for services is not deceptive.” Pet. App. 85a. It also noted that petitioner’s restrictions went far beyond any restriction that would be necessary to prevent dentists from engaging in “chicanery” such as selectively inflating the price from which the discount is computed. *Ibid.*

concerned the Commission. As the Court has emphasized, advertising “performs an indispensable role in the allocation of resources in a free enterprise system.” *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977); see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *AMA*, 94 F.T.C. at 1004; *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988); *American Dental Ass’n*, 94 F.T.C. 403, 405-406 (1979), modified, 100 F.T.C. 448 (1982).

On the facts of this case, the Commission found fully applicable the well-established importance of price and quality advertising to consumers. Advertising, it found, “is important to consumers of dental services and plays a significant role in the market for dental services.” Pet. App. 60a; see *id.* at 78a. Those findings by the Commission echo those of the ALJ, who concluded that petitioner’s “conspiracy has injured those consumers who rely on advertising to choose dentists.” *Id.* at 261a. The record showed that advertisements highlighting low or discount prices, comfort and gentleness in the provision of dental services, or both were effective in attracting consumers (and much more effective than “generic advertising without comparative quality or price claims”), demonstrating the importance of such information to consumers. *Id.* at 77a.<sup>29</sup> Accordingly, the Commission properly

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<sup>29</sup> Studies show that anxiety about discomfort in dental procedures is one of the principal reasons that consumers do not obtain needed dental services. See J. Elter, et al., *Assessing Dental Anxiety, Dental Care Use and Oral Status in Older Adults*, 128 J. Amer. Dent. Ass’n 591 (May 1997); N. Corah, et al., *The Dentist-Patient Relationship: Perceived Dentist Behaviors That Reduce Patient Anxiety and Increase Satisfaction*, 116 J. Amer. Dent. Ass’n 73 (Jan. 1988); N. Corah, et al., *Dentists’ Management of Patients’ Fear and Anxiety*, 110 J. Amer. Dent. Ass’n 734 (May 1985). Along with allaying concerns about pain, lower fees and a “friendlier and more caring” dentist are three of the four top factors that adults reported would make them more likely to visit a dentist. See *Influences on Dental*

found that information about price as well as “quality and sensitivity to fears is important to consumers and determines, in part, a patient’s selection of a particular dentist.” *Id.* at 76a-77a.

Petitioner attempts to minimize the competitive significance of some of the banned ads. It argues, for example (Br. 36-37), that discount advertising conveys “negligible informational content.” The short answer to such contentions is that, in a free-market economy, it is generally up to consumers to decide what information is useful and what is not. See generally N. Averitt & R. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 Antitrust L.J. 713 (1997). The advertising of discounted prices and references to “affordable fees” can signal to the consumer the potential availability of cost savings, which can then be investigated further.<sup>30</sup> Similarly, claims about quality of service, although dismissed by petitioner as “subjective” (Br. 40), may convey useful information concerning the attitudes and approach of the dentist—such as commitment to punctuality, to understanding the patient’s anxieties, or simply to providing high-quality care. As this Court has recognized, advertising can benefit

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Visits, 29 ADA News 4 (Nov. 2, 1998) (citing ADA Survey Center, 1997 Survey of Consumer Attitudes and Behaviors Regarding Dental Issues).

<sup>30</sup> Petitioner’s citation to an article written by FTC Chairman Pitofsky two decades ago does not advance its argument. That article emphasized the risk to consumers and the competitive process from overregulation of discount price claims “because of the special proconsumer and procompetitive effects of aggressive price competition.” R. Pitofsky, *Advertising Regulation and the Consumer Movement*, in *Issues in Advertising: The Economics of Persuasion* 27, 42 (D. Tuerck ed., 1978). Thus, while Chairman Pitofsky stated that a claim of “10 percent off” may be ambiguous and therefore ignored by consumers, he also stressed that regulation of such claims “entails considerable social and economic costs,” *id.* at 39, a proposition entirely consistent with this Court’s cases on advertising restrictions.

consumers even if it requires further inquiry. See *Morales*, 504 U.S. at 388-389 (noting utility of advertisements for discounted air fares); *Prof. Eng’rs*, 435 U.S. at 692-693 (rejecting argument that “inherently imprecise” pricing information was of no value to consumers). Petitioner “is not entitled to pre-empt the working of the market by deciding for itself that its [members’ patients] do not need that which they demand.” *IFD*, 476 U.S. at 462.

3. The Commission’s conclusions in this case are consistent with long-observed effects of advertising restrictions: they “increase the difficulty of discovering the lowest cost seller of acceptable ability[, and] \* \* \* [reduce] the incentive to price competitively.” *Bates*, 433 U.S. at 377. As the Commission also noted, the importance of advertising “attaches not only to price information, but to all material aspects of the transaction,” including quality. Pet. App. 59a. Although the Commission found it unnecessary to “quantify[] the increase in price or reduction in output occasioned by [petitioner’s] restraints” (*id.* at 78a), its conclusion that such results would ensue is supported by both the record and by “common sense and economic theory, upon both of which the FTC may reasonably rely.” *IFD*, 476 U.S. at 456. Moreover, as this Court stressed in *IFD*, the market may be deemed harmed by concerted, artificial suppression of information even without direct proof of effects on prices:

A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices.

*Id.* at 461-462.<sup>31</sup> Accordingly, the FTC's conclusion that petitioner's advertising restraints had anticompetitive effects is fully consistent with this Court's decisions and supported by the record.

**C. The Commission Properly Found That the Restraints Lack Any Plausible Procompetitive Justification**

Contrary to petitioner's contention, the FTC did not end its rule of reason inquiry once it determined that petitioner's restraints on truthful, nondeceptive advertisements had an anticompetitive effect. Rather, consistent with this Court's instructions about rule of reason analysis (*IFD*, 476 U.S. at 459; *Prof. Eng'rs*, 435 U.S. at 693-695), the FTC carefully considered petitioner's contentions that its advertising restrictions have procompetitive effects. See Pet. App. 84a-90a. The FTC fully recognizes that self-regulation by professional organizations "may serve to regulate and promote \* \* \* competition" by preventing deceptive practices. See *Prof. Eng'rs*, 435 U.S. at 696. It also acknowledged in this case that "the prevention of false and misleading advertising is indeed a laudable purpose." Pet. App. 84a. It found, however, that petitioner's advertising bans were not tailored to that purpose, but instead "swept aside" price and quality

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<sup>31</sup> Restraints on advertising, such as those in the present case, can increase a consumer's search costs in finding a dentist. The FTC has observed that agreements that increase consumer search costs are harmful to consumer welfare and form a proper concern of the antitrust laws. See *Detroit Auto Dealers Ass'n*, 111 F.T.C. 417, 495-496 (1989), aff'd in part and remanded, 955 F.2d 457 (6th Cir.), cert. denied, 506 U.S. 973 (1992). Furthermore, as the court of appeals recognized (Pet. App. 19a-20a), the concerted withholding of information that is of value to consumers may be viewed as a form of restriction on output. While the advertising information at issue here is not the principal output of dentists, neither were the x-rays at issue in *IFD*. In both cases, the information could be used, and was desired, by consumers (or insurers acting on their behalf) to make assessments regarding the purchase of dental services. Cf. *IFD*, 476 U.S. at 461-462.

advertising with "broad strokes," without regard to its potential for deception. *Id.* at 89a.

Before this Court, petitioner makes two principal arguments, neither of which has merit. With respect to price advertising, the sole procompetitive theory petitioner advances is that its disclosure requirements for advertising discounts will increase the amount of information provided to consumers. (Petitioner appears to make no argument in defense of its prohibition against comparative advertising claims such as "low fees" and "reasonable fees.") Because of that supposed potential for increased information, petitioner maintains (Br. 34-36) that a more detailed analysis of its restrictions was required. Whatever might be the merits of such a contention where disclosure requirements really do have a procompetitive potential, it cannot be sustained in this case, where (as we have explained) the FTC, employing its expertise in such matters, found that the *actual effect* of petitioner's onerous disclosure requirements, as they have been interpreted and enforced, is to suppress all across-the-board discounting claims. See p. 9, *supra*. The FTC therefore rejected petitioner's asserted procompetitive justification for its restraint only after finding it factually unsupportable.<sup>32</sup>

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<sup>32</sup> Petitioner maintains (Br. 30-31, 33) that its disclosure requirements require more extensive analysis because they are not "facially" anticompetitive (emphasizing that the literal terms of its Code of Ethics prohibit only false and deceptive advertising). The FTC, however, did not base its analysis on the *language* of Section 10 of petitioner's Code of Ethics, but rather on the actual enforcement of the advertising restrictions. As Professor Areeda noted, the phrase "facially unreasonable" as used in antitrust cases is "reminiscent of facially unconstitutional statutes" and thus "may seem to focus attention on the words on the face of an agreement." 7 P. Areeda, *Antitrust Law* ¶ 1508, at 405 (1986). In fact, as he pointed out, the phrase properly refers to a restraint about which a judgment can be made based on plausible arguments about anticompetitive effects without detailed proof. *Ibid.* Thus, the court of

With respect to its restrictions on quality claims, petitioner submits (Br. 38-39) that it may ban all such claims because they are “potentially misleading.” This Court has suggested that *some* quality claims by professionals about performance may well be misleading and may therefore be restricted. See *Bates*, 433 U.S. at 366, 383-384. The Court has not held, however, that *all* quality claims by professionals—even claims that do not relate directly to the quality of performance, such as promises of punctuality and offers of a comfortable environment, designed to dispel anxiety about visiting the dentist (p. 5, n.5, *supra*)—are necessarily misleading. Indeed, *Bates* warned of the potential of overbroad advertising restrictions used to “perpetuate the market position of established [market participants].” *Id.* at 377-378. The Court has also admonished, with respect to state regulation of marketing by professionals, that “the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.” *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 478 (1988) (internal quotation marks omitted). That admonition is even more apt in the context of industry self-regulation, where the body imposing restrictions lacks full public accountability and may be subject to incentives to adopt approaches that restrict competition.

In the present case, drawing distinctions between deceptive and nondeceptive advertising is precisely what petitioner did *not* do. Instead, it imposed blanket bans on useful advertising claims without regard to whether they were truthful or deceptive. Furthermore, although it had every

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appeals correctly ruled that petitioner’s advertising restrictions were “facially anticompetitive” (Pet. App. 24a), even though its understanding of the nature of petitioner’s restraints required an examination of its conduct in enforcing those restraints, and not merely the language of its Code of Ethics.

opportunity to do so, petitioner made no effort to show any basis on which a prophylactic restraint might be justified, such as a history of abuse, or false and deceptive advertisements that could not be prevented effectively by a more narrowly tailored rule. Cf. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626-628 (1995). The Commission also expressly allowed petitioner to enforce “reasonable ethical guidelines \* \* \* with respect to representations that [petitioner] reasonably believes would be false or deceptive.” Pet. App. 30a. Generalized arguments about the procompetitive benefits of suppressing false and deceptive advertising therefore cannot sustain petitioner’s overbroad restrictions.

**D. The Commission’s Market Power Analysis Of Petitioner’s Restraints Was Appropriate**

In light of the Commission’s conclusions regarding the anticompetitive effects of petitioner’s advertising restrictions, it did not find it necessary to perform an elaborate structural analysis of the markets in which petitioner’s members conduct business. Pet. App. 78a. As the Commission noted, this Court “has indicated that when a court finds actual anticompetitive effects, no detailed examination is necessary to judge the practice unlawful.” *Ibid.* n.19 (citing *NCAA* and *IFD*). Nevertheless, the Commission did examine market power, and it had an ample basis on which to conclude that petitioner had the ability “to impose the costs of its anticompetitive restrictions on California consumers of dental services,” *id.* at 84a, which was the relevant determination.

The facts supporting that determination are straightforward. Fully 75% of California’s practicing dentists (and 90% in one region) are members of petitioner.<sup>33</sup> Pet. App. 82a.

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<sup>33</sup> Compare *IFD*, where the Court affirmed the FTC’s finding of an unlawful restraint of trade where 67% of the dentists in one area participated in the restraint. 476 U.S. at 451. The 75% figure in this case

The Commission found substantial barriers to entry and few close substitutes for the services offered by petitioner's members. *Id.* at 82a-83a.<sup>34</sup> It also found that petitioner had the power to require members and aspiring members to comply with the restrictions, because of the importance placed on membership by California dentists. *Id.* at 80a-81a. Given those findings (which the court of appeals upheld and which petitioner does not challenge here), the Commission properly concluded that conspiring members of petitioner had the power to impose their will on the market as a whole. See *id.* at 84a.

The FTC was not required to approach the issue of market power as if this were a merger case. Market power analysis is not an end in itself; it is a tool to help determine whether the challenged conduct is anticompetitive. See *IFD*, 476 U.S. at 460. Because the anticompetitive potential of different types of conduct varies, the appropriate market power analysis varies as well. See, e.g., *NCAA*, 468 U.S. at 109-110; *IFD*, 476 U.S. at 460. Certain kinds of agreements challenged under the antitrust laws require an extensive structural analysis because it is not possible to reach a

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may actually underestimate petitioner's influence because its advertising strictures apply as well to affiliated employers, employees, and referral services. Pet. App. 81a.

<sup>34</sup> The ALJ found otherwise, Pet. App. 262a, but the Commission rejected that finding as predicated on an error of law, see *id.* at 83a. Contrary to the view of the ALJ, market power does not require a showing of "insurmountable" barriers to entry. Cf. U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* §§ 3.1-3.4, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1997). Furthermore, although petitioner relies heavily on the rejected findings of the ALJ, the courts review the findings of the Commission, not the ALJ, and sustain the Commission's findings if they are supported by substantial evidence. See *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1437 (9th Cir.), cert. denied, 479 U.S. 828 (1986); see generally *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951).

reasoned conclusion about the competitive effects of such agreements without an understanding of the market context. See *Northwest Wholesale Stationers*, 472 U.S. at 296 (buyer cooperatives); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 334 (1961) (exclusive dealing arrangements). Similarly, in merger cases, the antitrust tribunal must predict the competitive effect of structural changes to the market, and so the inquiry ordinarily focuses on structural issues. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 335 (1962). By contrast, in cases involving conduct deemed unlawful *per se*, there is generally no need for market analysis because the conduct is conclusively presumed to be anticompetitive.

Other cases fall between these two poles. *NCAA*, for example, involved a restraint that the Court characterized as a naked restraint on output, which could be condemned without an "elaborate industry analysis." 468 U.S. at 109. In *IFD*, the Court suggested that the agreement was sufficiently anticompetitive on its face to fall within the *NCAA* analysis. 476 U.S. at 460. It also made clear, however, that even if that were not the case, a full structural analysis of the market was not required. *Ibid.*

In this case, the Commission and court of appeals properly relied on this Court's teaching in *IFD* that "the finding of actual, sustained adverse effects on competition in those areas where [petitioner's] dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis." 476 U.S. at 461; see also Pet. App. 24a (court of appeals noting that advertising restrictions imposed by such "large scale professional organizations" have substantial anticompetitive effects that can properly be condemned "without careful market definition") (quoting 7 P. Areeda, *Antitrust Law* ¶ 1503, at 377 (1986)). The advertising that petitioner bans

informs consumers so that they may compare competing market participants. If, as the Commission found, a combination comprising three-quarters of the practicing dentists in the State adheres to strict policies banning such advertising, then consumers will lack the information they desire, regardless of the actions of other market participants. Accordingly, once the Commission found that the restraint had anticompetitive effects and that petitioner could inflict those effects on the market as a whole, it was amply justified in concluding that petitioner "possesses the necessary market power to impose the costs of its anticompetitive restrictions on California consumers of dental services." Pet. App. 84a.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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CALIFORNIA DENTAL ASSOCIATION,

PETITIONER,

v.

FEDERAL TRADE COMMISSION

RESPONDENT.

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER  
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## I. THE COMMISSION DOES NOT HAVE JURISDICTION OVER CDA

### A. The Clear Language Of The Statute Does Not Vest The Commission With Jurisdiction Over Nonprofit Professional Associations

The critical language in the Federal Trade Commission Act ("FTC Act") to determine jurisdiction in this case is as follows:

"Corporation" shall be deemed to include any company . . . or association . . . which is organized to carry on business for its own profit or that of its members . . .

15 U.S.C. §44. In *Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1017-18, 1020 (8th Cir. 1969) ("Community Blood Bank"), the Court of Appeals, after applying familiar rules of statutory construction, held that the Commission did not have jurisdiction over nonprofit professional associations unless they were in reality organized to conduct "business" for the pecuniary "profit" of their members as those words are commonly understood. The common, ordinary meaning of "profit" is the excess of revenues over investment or expenses, which has been paid or is contemplated to be paid to members. *Id.* at 1017.

The Commission makes four erroneous contentions: that *Community Blood Bank* held that only "charitable organizations" are exempt from the FTC Act (Resp. Br. 21 n.14), that the term "profit" should be interpreted more broadly than *Community Blood Bank* did (*id.* at 17), that the legislative history supports the Commission's jurisdiction over nonprofit professional associations (*id.* at 16-17), and that the doctrine of deference should be applied to the FTC's unreasonably expansive view of its jurisdiction (*id.* at 25-26).

The Commission urges that "profit" has been "used to refer" generally to pecuniary benefit. Resp. Br. 17. In

addition, it argues that dictionaries define "profit" more broadly than *Community Blood Bank*, and that Congress has also used the term variously. *Id.* at 17-18. Significantly, the Commission overlooks the fact that a word must be read in context and that "the words associated with it may indicate . . . the true meaning." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 861 (1984) ("Chevron").

Moreover, the complete answer to the Commission's definitional argument can be found in *Community Blood Bank* because the Commission made the identical argument there. Initially, the Eighth Circuit noted that "profit" has different definitions because it is used for a variety of purposes and that its "meaning must be derived from the context in which it is used." 405 F.2d at 1016. The court then observed that the Commission's "strained interpretation" is at odds with the principle "that Congress will be presumed to have used a word in its usual and well-settled sense." *Id.* (quotation omitted).

The cases are legion for the proposition that "profit" means gain from business or investment after deducting expenditures.<sup>1</sup> Indeed, the Commission in its opinion in *Community Blood Bank* also adopted this precise definition "as the most generally accepted definition of profit" when applied to a for profit association. 405 F.2d at 1017 n.10; *see In re Community Blood Bank of the Kansas City Area, Inc.*,

<sup>1</sup> See, e.g., *Rubber Co. v. Goodyear*, 76 U.S. 788, 804 (1869) ("Profit' is the gain made upon any business or investment, when both the receipts and payments are taken into the account."); *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 1998 WL 795246, at \*9 (5th Cir. Dec. 4, 1998) (King, J., dissenting) (profit defined as the "gain realized from a business over and above its [capital] expenditures"); *Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042, 1050-51 (5th Cir. 1987) (same); *MCA, Inc. v. Wilson*, 677 F.2d 180, 186 (2d Cir. 1981) (same); *Fechteler v. Palm Bros. & Co.*, 133 F. 462, 469 (5th Cir. 1904) (Profit implies "the gain resulting from the employment of capital – the excess of receipts over expenditure.").

70 F.T.C. 728, 907 n.41 (1966) ("*In re Community Blood Bank*"). However, it adopted its own definition of "profit" for nonprofits. 405 F.2d at 1017 n.10. The Eighth Circuit concluded that neither the statute nor the legislative history supported the FTC's position that "profit" could be interpreted differently depending on the "character of the corporation under consideration." *Id.* at 1016. Manifestly, the fact that "profit" may have more than one dictionary definition does not advance the Commission's theory since the context of the statute makes these other definitions relied upon by the Commission totally irrelevant.<sup>2</sup>

#### B. CDA Is Not Organized For Its Own Profit Or That Of Its Members

The common thread and the fundamental error in the Commission's opinion below (Cert. App. 50a-51a) and in the position taken by the Commission in this Court is the narrow view that the holding in *Community Blood Bank* only applies to nonprofits which have a 501(c)(3) charitable exemption under the Internal Revenue Code.<sup>3</sup> The court in *Community*

<sup>2</sup> Even the Ninth Circuit characterized the Commission's approach as using a "surrogate" for "profit." Cert. App. 16a. In any event, the Commission's claim that the record contains substantial evidence "that petitioner provides its members with 'substantial pecuniary benefits'" (Resp. Br. 28) rests on a myopic examination of the record. The Commission's reliance on CDA's financial documents, which note that 65% of expenditures in one year went to "direct member services" and 7% went to "public service expenditures" (Resp. Br. 2 n.1) as evidence that CDA provides "pecuniary" benefits to members misapprehends the nature of the services provided by CDA. For example, the "seminars, training sessions, and publications offered to members" cited by the Commission (*id.*), although correctly identified as "direct member services," are obviously designed to improve the art and science of dentistry. Thus, the "direct member services" are consistent with CDA's public purpose and serve the public interest as well.

<sup>3</sup> The Commission's attempt to dismiss CDA's argument that its exemption from federal taxation under Section 501(c)(6) is powerful evidence that it is not "organized to carry on business for . . . profit" within the meaning of the FTC Act is unpersuasive. Resp. Br. 18 n.10.

*Blood Bank* uses the terms "nonprofit" and "charitable organization" interchangeably. 405 F.2d at 1019-20. In fact, in the world of nonprofits, the term "charitable" has a broad interpretation, meaning essentially that the association lessens the burden of government.<sup>4</sup>

In *Community Blood Bank*, it is clear that the hospital association could not have been a 501(c)(3) entity because it had two for profit members as well as a 501(c)(4) member and had another eight members who were incorporated under the Kansas general nonprofit statute and not under the state charitable statute. *In re Community Blood Bank*, 70 F.T.C. at 767. Thus, although some of its members were 501(c)(3) entities, many were not. As a result, the hospital association is strikingly similar to CDA; both associations were not 501(c)(3) associations. Of equal importance, the Eighth Circuit never indicated that there was any significance associated with the applicable tax exemption so long as the nonprofit was tax exempt.

The decisions relied upon by the Commission for the assertion that many courts have entertained cases against

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In order to qualify for exemption under Section 501(c)(6), an organization must establish that it is "not organized for profit" and that "no part of [its] net earnings . . . inures to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(6). Moreover, the Commission's assertion that CDA's reliance on Section 501(c)(6) is flawed because "there are significant differences between the purposes and operation of the revenue laws and the FTC Act" (Resp. Br. 18 n.10) is curious in light of the talismanic significance the Commission elsewhere attaches to an entity's status as exempt from taxation under Section 501(c)(3) or, alternatively, section 501(c)(6) to justify its jurisdiction over nonprofit professional associations. Cert. App. 50a-51a.

<sup>4</sup> *Portland Golf Club v. Commissioner*, 497 U.S. 154, 161 (1990). The Commission found that the CDA does serve the public. Cert. App. 107a. If this public service was not performed by the CDA, government would be burdened with performing these educational and standard setting services. This is the reason Congress granted nonprofit associations a tax exemption.

trade or professional associations (Resp. Br. 20-21) are not persuasive in that either the jurisdictional issue was not raised or the courts adopted the logic of *Community Blood Bank* that, in these cases, the organizations "derived a profit over and above the ability to perpetuate or maintain their existence."<sup>5</sup> 405 F.2d at 1019.

Thus, the Eighth Circuit aptly observed:

Congress took pains in drafting . . . to authorize the Commission to regulate so-called nonprofit corporations, associations and all other entities if they are in fact profit-making enterprises.

405 F.2d at 1018. Clearly, the FTC Act is quite limited and not expansive as the Commission maintains. The record in this case is clear that CDA does not engage in "business" and has not paid "profits" as that term is commonly understood.

The Eighth Circuit's holding in *Community Blood Bank* is much wider in scope than the Commission's artificially narrow reading as exempting only charitable organizations.<sup>6</sup> The court's summary of its holding succinctly states:

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<sup>5</sup> Indeed, in many of these cases the trade associations were established for the sole purpose of violating the antitrust laws. See, e.g., *FTC v. Cement Inst.*, 333 U.S. 683, 719 (1948); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 461 (1941); *In re Indiana Fed'n of Dentists*, 101 F.T.C. 57, 115 (1983). When an entity's sole purpose is to thwart the antitrust laws, it is organized to conduct business for a profit. The above cases represent a situation far different than CDA's, whose purpose is the public interest, namely "to promote high professional standards in the practice of dentistry," and "to promote the art and science of dentistry as a profession." RX 115; TR 1134.

<sup>6</sup> Commissioner Elman's dissent from the Commission's decision in *Community Blood Bank*, which was relied upon by the Eighth Circuit (405 F.2d at 1019), observed:

I do not see how we can refuse to give effect to the words "organized to carry on business for . . . profit" in Section 4. The words are plain and unambiguous. Unless we may completely ignore express language used by Congress, it is inescapable to me

3. That the corporate petitioners are true nonprofit corporations, not engaged in business for profit for themselves or their members.

4. That the Commission lacks jurisdiction over all of the petitioners.

*Id.* at 1022.

### C. The Legislative History Supports CDA's Construction Of The FTC Act

In light of the plain language of the statute, the Commission fails to address the threshold issue of whether a review of legislative history is appropriate. *Cf. Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1955-56 (1998). Nevertheless, the legislative history establishes that, when the FTC Act was passed, Congress did not have in mind any concern for professional associations but, on the contrary, intended to establish an agency that would develop expertise concerning commercial and industrial organizations and combinations. H.R. Rep. No. 63-1142 at 18-19 (1914); S. Rep. No. 63-597 at 8-9 (1914). Thus, the Commission misinterprets the legislative history when it contends that there is no exemption for professional associations, citing this Court's decisions in *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) ("Prof'l Eng'rs"), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). These cases do not consider whether professional associations that do not conduct business and do not earn a profit are subject to the Commission's

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that the jurisdiction of the Commission under the Federal Trade Commission Act with respect to corporations is different from, and significantly narrower than, the jurisdiction created by the Clayton and Sherman Acts, and does not include genuine nonprofit corporations.

70 F.T.C. 728, 948-49 (1966).

jurisdiction.<sup>7</sup> This is not a situation involving a professional exemption but rather one of initial application of the statute to CDA.

The Commission's principal argument regarding the legislative history is that the letter from Joseph E. Davies, then Commissioner of the predecessor to the Commission, to Senator Newlands, the author of the Senate version of the FTC Act, to expand the legislation to cover "corporations without capital stock" was noteworthy because it was an effort to include nonprofit corporations within the Act. Resp. Br. 19-20. First, Mr. Davies' letter referred solely to commercial associations of manufacturers or dealers, not professional associations. 405 F.2d at 1017-18. Second, *Community Blood Bank* interpreted this history to mean only that an association, whether nonprofit or for profit, would be subject to the Commission's jurisdiction if it engages in business to make a "profit" which it distributes to its members or shareholders. *Id.* at 1016-17.

Moreover, the fact that the Commission never sought to assert jurisdiction over professional associations for the first several decades of its existence is further proof that Congress never bestowed such jurisdiction when it passed the FTC Act. As this Court has explained, although Congress, not the enforcing agency, is responsible for determining the scope of its legislation, the failure to assert "power by those who presumably would be alert to exercise it, is . . . significant in determining whether such power was actually conferred." *Bankamerica Corp. v. United States*, 462 U.S. 122, 131 (1983) (citation omitted). In addition, the Commission concedes that it did not claim such jurisdiction until *after* this Court's decision in *Goldfarb*. Resp. Br. 24.

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<sup>7</sup> The Commission acknowledges that the CDA would be subject to both the Sherman Act and the Clayton Act if it did not have jurisdiction over professional associations, and CDA is not urging any exemption from the antitrust laws. Resp. Br. 25 n.21.

Congress unequivocally understood how to enact antitrust legislation that covered all corporations but purposefully chose not to do so with the FTC Act. The Commission's bold effort to eviscerate Congressional intent should not be sanctioned by this Court.

#### D. The Commission's Construction Of Its Jurisdiction Is Not Entitled To Deference

As discussed above, the plain text and clear meaning of the FTC Act demonstrate that the Commission does not have jurisdiction over nonprofit professional associations. Thus, the Commission's reliance on *Chevron* (Resp. Br. 25-26) for the proposition that the Court must defer to the Commission's overreaching construction of its jurisdiction not only directly contradicts the position it took during oral argument before the Ninth Circuit, but also is inapposite. "[I]n defining agency jurisdiction Congress sometimes speaks in plain terms, in which case the agency has no discretion." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 382 (1988) (Scalia, J., concurring) (discussing application of *Chevron* deference principle). See also *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter . . . ."); *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress."). Clearly, the Commission's unjustified attempt to expand its jurisdiction under the FTC Act is not entitled to deference. Contrary to the Commission's suggestion (Resp. Br. 25-26), statutory construction does not begin or end with the reasonableness of an agency's interpretation of its jurisdiction and authority. *Chevron*, 467 U.S. at 842-43.

The Commission's current *Chevron* deference argument directly contradicts the position it took before the Ninth Circuit. During oral argument, Judge Hall inquired of the Commission's counsel whether the *Chevron* deference

principle was applicable. He answered: "I do not think that sort of deference . . . is necessarily owed with respect to our jurisdiction."<sup>8</sup> Significantly, the Commission did not raise its deference argument until its brief on the merits in this Court. Thus, the Court is entitled to ignore the Commission's belated embrace of this argument. *Cf. Schiro v. Farley*, 510 U.S. 222, 228-29 (1994).

Deference to the Commission's expansive creation of its jurisdiction is particularly inappropriate where, as here, it concedes that its construction is a recent gloss arising from this Court's decision in *Goldfarb*, and that it previously refrained from asserting jurisdiction over professional associations because it assumed that it did not have such jurisdiction. Under the circumstances, the Commission's belated, unwarranted attempt to disregard Congress' intent should be rejected by this Court.

The Commission argues that CDA's public purpose test will cause serious difficulties regarding proper classification of association activities. Ironically, the Commission's substantiality test for tangible pecuniary benefits is even more troublesome in application, and none of the decisions below made any effort to define what "substantial" means. Thus, the *Community Blood Bank* rationale, which is in harmony with Congressional intent, should be adopted by this Court. Nonprofit professional associations that in reality do not operate a business or earn a "profit," as that term is commonly understood, should not be subject to the Commission's jurisdiction.<sup>9</sup>

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<sup>8</sup> See audiotape of oral argument of Ernest J. Isenstadt, General Counsel, Federal Trade Commission, July 16, 1997.

<sup>9</sup> Alternatively, if the nonprofit association earned a "profit," was a sham nonprofit, or became a vehicle primarily to violate the antitrust laws, the Commission would have jurisdiction.

## II. SUMMARY CONDEMNATION OF CDA'S ETHICAL CODE WAS LEGAL ERROR

CDA's advertising guides do not ban, but merely regulate the content of price and quality dental ads. The challenged guidelines accommodate a broad range of ads. Indeed, dental advertising continues to flourish in California. Cert. App. 114a; CX 1592-1602; RX 134; TR 191-92, 513-14, 720-21, 1135. CDA's policies encourage ads to meet two criteria: (1) discount ads should inform the consumer whether he or she qualifies for a discount and the amount he or she will pay; and (2) price and quality ads should contain verifiable claims. Both criteria have procompetitive benefits: they provide information needed by consumers to make informed decisions, reduce search costs, and protect against deception.

The ALJ found no evidence that CDA's policies have increased the price or reduced the output of dental services. Cert. App. 262a.<sup>10</sup> Nonetheless, the Commission and the Ninth Circuit presumed competitive injury. Such a presumption flies in the face of this Court's precedents and is contrary to sound policy. No decision of this Court supports summary condemnation of conduct that serves a procompetitive purpose and has no impact on price or output.

### A. CDA's Advertising Guides Are Procompetitive

Self-regulation by the professions, particularly regulation of advertising, has long been recognized as procompetitive. *Prof'l Eng'rs*, 435 U.S. at 696; *Bates v. State Bar*, 433 U.S. 350, 384 (1977); STEPHEN BREYER, *REGULATION AND ITS REFORM* 27-28 (1982). Due to information asymmetries, professional advertising "poses special risks of deception" and is therefore the proper subject

<sup>10</sup> This is an explicit ALJ finding, not, as the Commission contends (Resp. Br. 7 n.8), a mere recitation of CDA's expert's testimony. Cert. App. 262a. The Commission did not contradict this crucial finding.

of ethical codes. *In re R.M.J.*, 455 U.S. 191, 200 (1982). The Commission does not dispute this point.

CDA addresses potential deception in a specific, targeted manner. As to discount ads, CDA provides for disclosure of the amount of the non-discounted fee, the amount or percentage of the discount, the time period the discount is available, and those eligible for the discount. Any ad that discloses these straightforward facts is consistent with CDA's ethical code. As to all other pricing ads (e.g., ads claiming "low" or "affordable" fees), CDA's guides provide only that they should contain verifiable facts. Similarly, CDA guidelines on quality ads are directed only at those that contain unverifiable claims.

Far from being "onerous" or "highly restrictive" (Resp. Br. 33, 35), CDA's guides are easily met. A dentist can readily advertise a discount by claiming: "Teeth cleaning, regularly \$30, now \$27 for all patients during January 1999." This ad contains all of CDA's disclosures. See Cert. App. 122a. A dentist seeking to market a commitment to punctuality can advertise, if true: "On average, patients are seen within ten minutes of their appointment." This quality ad contains factual information that is subject to verification.

Ads meeting CDA's criteria increase the flow of information, enabling consumers to make informed choices and reducing search costs. In the above discount example, the consumer learns the exact amount he or she will pay and may readily compare dentists' advertised prices. This reduction in search costs is "particularly procompetitive." Robert Pitofsky, *Advertising Regulation and the Consumer Movement*, in *ISSUES IN ADVERTISING: ECONOMICS OF PERSUASION* 27, 39-40 (David G. Tuerk ed., 1978) ("Pitofsky").

The Commission does not claim CDA's guides preclude all price or discount ads. It asserts only that the disclosures render impractical "across the board" discount ads. Resp.

Br. 35.<sup>11</sup> However, as Chairman Pitofsky has acknowledged, an ad offering “10% off on all services” provides no more comparative price information than one which is silent as to price. Pitofsky at 39. The only “benefit” the Commission identifies for such ads is that they “can signal . . . the potential availability of cost savings, which can then be investigated further.” Resp. Br. 38. The consumer is left totally at sea as to whether the discount reduces a dentist’s prices below those of others. No search costs are saved.

The record is devoid of any evidence that consumers rely on “across the board” discount ads in selecting dentists or that such ads are even used by the thousands of California dentists not subject to CDA’s ethical code. In fact, the record suggests that dentists avoid “across the board” discount ads due to insurance reimbursement concerns and their ineffectiveness as a marketing tool. TR 628-29, 645-46; Cert. App. 124a.

Contrary to the Commission’s assertion, CDA also does not ban all quality claims. Resp. Br. 35. CDA’s guides discourage only those “quality” ads that are non-factual, whose truth cannot be determined, and therefore carry a significant potential for deception. The Commission’s reference to patient anxiety (Resp. Br. 37 n.29) highlights the importance of encouraging factual claims. This Court long ago approved limits on dental advertising because anxious consumers are particularly susceptible to the potential

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<sup>11</sup> The Commission cites to testimony in the record that a dentist may not practically include in a yellow pages ad CDA’s suggested disclosures for all of his or her procedures. Resp. Br. 4 n.3. This is not the only form of advertising. The Commission does not contest that a dentist can practicably include such disclosures in a one or two page flyer. Also, the Commission also does not dispute that only a handful of dental procedures account for a large percentage of dentists’ practices (AMERICAN DENTAL ASSOCIATION, THE 1990 SURVEY OF DENTAL SERVICES RENDERED 25-29 (1994)) and that discount ads for these few procedures can easily include the disclosures promoted by CDA.

deception inherent in unverifiable claims. *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 609-12 (1935).

Again, the Commission manages only the most tenuous defense of unverifiable price and quality claims, speculating, without citation to the record or to economic literature, that such claims “may convey useful information concerning the attitudes and approach of the dentist.” Resp. Br. 38. Economists, however, view subjective claims as unhelpful to consumers, Robert B. Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U.L. REV. 775, 801, 803 (1979), and useable by sellers of complex services (such as dental care) to give erroneous “signals” of quality. Philip M. Parker, “Sweet Lemons”: *Illusory Quality, Self-Deceivers, Advertising, and Price*, 32 J. MKTG. RES. 291, 303, 304 (Aug. 1995).

Dentists wishing to make quality claims can easily do so through factual disclosures regarding their procedures or techniques. This Court approved such an approach in *Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979) (ban on trade names in optometry upheld because optometrists remained free to advertise factual information). No verifiable information is barred by CDA’s guides. Accordingly, far from “pre-empt[ing] the working of the market” (Resp. Br. 39), CDA’s policies facilitate an efficient market by providing consumers with factual information. Pitofsky at 37 (mandated disclosure of octane content of gasoline in lieu of vague descriptive labels is procompetitive).<sup>12</sup>

The Commission invokes a supposed finding of fact that unverifiable price and quality claims provide information valued by consumers. Resp. Br. 29, 34, 35, 42. The Commission’s opinion, however, refers only to the ALJ’s *general* fact findings that “[a]dvertising which conveys

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<sup>12</sup> For this reason, this Court’s decisions in *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466 (1988), and *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), are unavailing to the Commission. Both cases involved total bans on certain attorney solicitations.

[price and quality] information is important to consumers." Cert. App. 76a-77a, 231a. CDA does not contest the importance of factual price and quality ads – indeed, CDA's guides facilitate such advertising by encouraging disclosure of verifiable claims.

In short, CDA's policies address the unique concerns raised by professional advertising which this Court identified in *Bates*. The Court noted that the difficulty consumers have in evaluating professional advertising claims may necessitate requiring "more disclosure, rather than less." 433 U.S. at 375. This Court expressed particular concern about quality claims that "are not susceptible of measurement or verification" and thus "may be so likely to be misleading as to warrant restriction." *Id.* at 383-84.

This Court's decision in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), upon which the Commission relies, highlights the need carefully to evaluate advertising policies in light of the particular industry. The ad restrictions in *Morales* were far more onerous than those here. *Id.* at 387-88. Nonetheless, this Court performed a detailed analysis of the restrictions in light of the "dynamics of the air transportation industry," including its cost structure and the relative price sensitivity of different categories of consumers. *Id.* at 389. Only after this detailed industry analysis did the Court strike down the advertising restrictions, concluding:

All in all, the obligations imposed by the guidelines would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge.

*Id.* at 390. In contrast, the Commission in this case engaged in no detailed analysis of the unique aspects of dentistry and consumer demand for dental services, or the impact of CDA's policies on the volume and content of ads. In fact, as Commissioner Azcuenaga pointed out in her dissent, "the record suggests that CDA has not deterred dentists in

California from advertising" (Cert. App. 114a), and the ALJ explicitly found that CDA's policies have had no impact on the price or output of dental services. Cert. App. 246a, 262a.

#### **B. CDA's Advertising Guides Must Be Judged Under A Full Rule of Reason Analysis**

All practices are judged under the antitrust laws by their "impact on competition." *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984) ("NCAA"). The rule of reason is the prevailing standard for evaluating competitive impact. Under the rule of reason, a practice's procompetitive and anticompetitive effects are weighed, and a practice is condemned only if on balance it has an anticompetitive effect. Departure from this analysis "must be justified by demonstrable economic effect." *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988).

The Ninth Circuit and Commission strayed from these tenets of antitrust law. The ALJ found that the Commission failed to establish a violation under the rule of reason. Cert. App. 262a. Despite the ALJ's findings, the Ninth Circuit and the Commission applied a "quick look" analysis that presumed competitive injury. No decision of this Court supports such an approach in this case. Indeed, the Commission can cite to no decision by any federal court in which a practice with acknowledged procompetitive benefits and no impact on competition was summarily condemned.

The Commission and the amici curiae States principally rely on *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) ("IFD"). *IFD* involved an agreement among dentists to withhold x-rays from insurers. The Commission determined that the provision of x-rays was an element of competition between dentists and that the *complete ban* on providing x-rays foreclosed that competition. *Id.* at 452. The Federation proffered *no* procompetitive rationale, asserting only "noncompetitive 'quality of care' justifications." *Id.* at 462. At trial, the Commission

established that, in other states where there were no collective refusals, insurance companies had no difficulty obtaining x-rays. *Id.* at 456-57.

This Court characterized the conduct in *IFD* as akin to a group boycott and held that “[a] refusal to compete with respect to the package of services offered to customers . . . impairs the ability of the market to advance social welfare.” *Id.* at 459. The Court concluded that “[a]bsent some countervailing procompetitive virtue – such as, for example, the creation of efficiencies in the operation of a market,” a refusal to compete is unlawful. *Id.* –

CDA’s ad policies do not involve a refusal to compete as to any element of competition. CDA does not ban price or quality ads; it merely regulates their content. The challenged guidelines promote competition by encouraging more disclosure. While in *IFD* there was a finding of actual anticompetitive effect, here the ALJ found that CDA’s policies had no impact on competition. Cert. App. 245a, 246a. Also in contrast to *IFD*, the Commission in this case could provide no “empirical evidence . . . that CDA members advertise less frequently than [non-members] or that dentists in California advertise less than dentists in other states.” Cert. App. 114a. Indeed, dental advertising in California is flourishing. *Id.*; CX 1542-1602; RX 134; TR 191-92, 513-14, 720-21, 1135.

The Commission now asserts that it conducted “an extensive analysis of the effects of [CDA’s] advertising restrictions.” Resp. Br. 35. However, the Commission’s “analysis” consisted only of equating CDA’s ad restrictions with competitive injury. Cert. App. 74a-78a. It made no evaluation of the procompetitive benefits of CDA’s disclosures, and it failed to weigh such benefits against any anticompetitive effects. The Commission failed even to evaluate whether CDA’s policies had any impact on the type or quantity of dental advertising in California. At trial, the Commission failed to “offer evidence, even in the form of

testimony of an expert economist, on the fundamental elements of a rule of reason analysis.” Cert. App. 110a. This examination of CDA’s guidelines falls far short of the “detail necessary to understand [their] competitive effects.” Resp. Br. 33 (quotation omitted).

The Commission concedes that CDA’s policies have procompetitive benefits – they prevent deceptive dental ads. See, e.g., Cert. App. 89a. Its complaint is that CDA’s guides are overbroad, precluding some non-deceptive advertising. The rule of reason requires an evaluation of both the beneficial and adverse effects of CDA’s guides and a determination of whether, on balance, the guides injure competition for dental services. See, e.g., *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (under rule of reason “fact-finder weighs all of the circumstances of a case”); *Doctor’s Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 307 (5th Cir. 1997) (“anticompetitive evils . . . must be balanced against any procompetitive benefits or justifications . . .”). The ALJ’s findings of no anticompetitive effects (Cert. App. 245a, 246a, 262a) preclude the finding of a violation under a proper rule of reason analysis. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29-31 & nn.49, 52 (1984) (no violation absent showing of anticompetitive effect, i.e., “an empirical demonstration concerning the effect of the arrangement on price or quality”).<sup>13</sup>

The Commission complains that requiring it to use its expertise to perform the assessment contemplated by the rule of reason “would interpose unjustified barriers to [its]

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<sup>13</sup> To the extent the Commission is suggesting that CDA’s guides are unlawful because they are not the least restrictive means of accomplishing CDA’s objective, this Court has never adopted a least restrictive means test under the antitrust laws and the Commission has previously disavowed that such a test is appropriate. See Brief for the United States as Amicus Curiae in Support of Affirmance at 28-29, *NCAA* (No. 83-271).

adjudication of antitrust claims." Resp. Br. 30. The Commission forgets that only *anticompetitive* conduct is unlawful. If the Commission can summarily condemn conduct that has no competitive effect, a wide range of legitimate commercial conduct would be subject to challenge, discouraging innovative and efficient business practices. *See NYNEX Corp. v. Discon, Inc.*, 67 U.S.L.W. 4031, 4033-34 (U.S. Dec. 14, 1998). CDA does not seek a "rigid requirement" that "exhaustive market analysis" occur in all rule of reason cases. Resp. Br. 34. CDA asserts only that advertising disclosure requirements promulgated by professional associations and directed at potentially misleading and unverifiable claims may be prohibited only if the requirements' anticompetitive effects outweigh their procompetitive benefits. Pet. Br. 41.<sup>14</sup>

The Commission now argues that a presumption that CDA's practices would affect price and output "is supported by both the record and by common sense and economic theory." Resp. Br. 39 (quotation omitted). The challenged practices have existed for years, yet, after a full trial, the ALJ found that the Commission "ha[s] not produced any convincing evidence" that CDA's practices "have . . . or could . . . raise prices or reduce output." Cert. App. 262a. Thus, the record directly contradicts the Commission's presumption. Moreover, "common sense" and "economic theory" are no substitutes for the trial record. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992) ("This Court has preferred to resolve antitrust

<sup>14</sup> The amici curiae States contend that an abbreviated rule of reason is applicable where the challenged practice is a naked restraint or has been shown to have an adverse effect on competition. States' Br. 16-17. Under this standard, the "quick look" rule of reason was inappropriate here. States' Br. 16-17.

claims on a case-by-case basis, focusing on the particular facts disclosed by the record.") (quotation omitted).<sup>15</sup>

While asserting that no market structure or market power assessment was necessary, the Commission argues that CDA had market power based on membership by 75% of California's dentists, the presumed value of membership, and entry barriers. Resp. Br. 43-44. "Market power is the ability to raise prices above those that would be charged in a competitive market." *NCAA*, 468 U.S. at 109 n.38. Here, the ALJ specifically found that CDA had no such power. Cert. App. 262a.<sup>16</sup>

The Commission correctly points out that "[m]arket power analysis is not an end in itself." Resp. Br. 44. Where there is direct evidence of competitive effects, or the lack

<sup>15</sup> The Commission implies that this Court can apply the *per se* rule if the Court concludes that the Commission's rule of reason analysis was insufficient. Resp. Br. 29 n.24. The Ninth Circuit found the *per se* rule inapplicable (Cert. App. 18a) and the Commission did not seek review of that ruling. Moreover, this Court has declined to apply the *per se* rule to conduct far more egregious than that here. *See IFD*, 476 U.S. at 458-59; *NCAA*, 468 U.S. at 100-01; *Prof'l Eng'rs*, 435 U.S. at 686-87.

<sup>16</sup> That 75% of California's dentists are CDA members says nothing about CDA's market power as membership is voluntary and not a prerequisite to successful practice. Cert. App. 144a, 245a. The Commission argues that membership is so valuable that dentists remain members despite CDA's ad guidelines. Resp. Br. 44. It is equally plausible that dentists retain their membership because they do not find compliance with CDA's disclosures to be burdensome. Cert. App. 145a-46a. The Commission's market structure/market power analysis is also defective in that it fails to define the geographic market(s) in which to evaluate CDA's market position. Cert. App. 138a-39a, 262a; *Doctor's Hosp. of Jefferson, Inc.*, 123 F.3d at 310 (market power can only be assessed in properly defined geographic market). Finally, the Commission held that the ALJ applied the wrong legal standard in finding no entry barriers. Cert. App. 83a-84a. However, the ALJ correctly ruled that an entry requirement is a barrier only if it was not faced by existing competitors. 2A PHILLIP E. AREEDA ET AL., *ANTITRUST LAW* ¶ 420C, at 61 (1995). No such barrier was identified in this case. Cert. App. 139a-43a.

thereof, market power analysis is unnecessary. Here, the ALJ found "no impact on competition in any market in the State of California." Cert. App. 246a. Thus, the Commission and the Ninth Circuit erred in summarily condemning CDA's advertising guides.

### **CONCLUSION**

CDA respectfully requests that the Court reverse the judgment of the Ninth Circuit and deny enforcement of the Commission's Order.

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CALIFORNIA DENTAL ASSOCIATION,*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

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**On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit**

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**BRIEF OF AMICUS CURIAE AMERICAN SOCIETY OF  
ASSOCIATION EXECUTIVES IN SUPPORT OF PETITIONER**

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## **INTEREST OF AMICUS CURIAE<sup>1</sup>**

The American Society of Association Executives ("ASAE"), has a strong interest in the outcome of this case. ASAE is itself an individual membership nonprofit organization and an umbrella organization serving executives of many other such organizations. ASAE's membership includes 24,000 association executives and staff, who are employed by more than 11,000 organizations. Approximately one-third manage charitable and social welfare organizations. The remaining two-thirds manage professional societies or trade associations. ASAE addresses only the first question presented in this case, the Federal Trade Commission's jurisdiction. ASAE is uniquely placed to assist the Court in its consideration of the issues raised because it is familiar with the wide range of membership structures, purposes, and activities of thousands of nonprofit membership organizations potentially affected by the Ninth Circuit's ruling below.

### **STATEMENT**

Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to

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<sup>1</sup> The parties have consented to the submission of this brief. The letters of consent have been filed with the Clerk of this Court. None of the parties authored this brief in whole or in part and no one other than amicus, its members, or counsel contributed money or services to the preparation or submission of this brief. See Sup. Ct. R. 37.6.

construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools. . . . Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.

Alexis de Tocqueville, *Democracy in America* 106 (Everyman's Library 1994) (1835).

The extraordinary variety of nonprofits in this country counsels in favor of a careful approach to defining the limitations Congress imposed on the Federal Trade Commission's jurisdiction, in order to avoid unexpected and unwarranted effects on organizations that Congress intended to leave outside that jurisdiction. All parties agree that Congress did not provide the Federal Trade Commission ("FTC" or "Commission") with the power to investigate and discipline every type of nonprofit entity. The guidance this Court will provide to the Commission and to the public as to the scope of the FTC's jurisdiction affects a huge range of nonprofits that are significantly different from each other and from the group before the bar. These membership organizations do not fall neatly into a few simple categories.

There are more than a million nonprofit organizations in this country.<sup>2/</sup> They undertake a vast array of useful activities

that, in other countries, are undertaken by government or not at all. Nonprofits sponsor libraries, opera companies, symphonies, art museums and cater to enthusiasts for particular artists. Local historical societies preserve and study the past; health charities sponsor public awareness and research to improve the present and future. Fraternal service organizations such as the Brotherhood of the Paternal Order of Elks and religiously affiliated service organizations such as the National Council of Jewish Women or the YMCA provide many community services. Nonprofits foster amateur sports competitions. Organizations of schools, such as the American Association of Universities, and of those who teach particular subjects, such as the American Association of Math Teachers, work to improve education. Even government entities and government employees often form or join private membership organizations, such as the American Association of Counties, the National Association of District Attorneys, the National Association of Chiefs of Police, the National Association of School Nurses, to improve the services provided by government. There is at least one membership group for virtually every line of work and at least one trade organization for virtually every line of business. There are also thousands of organizations to further particular causes, such as the Sierra Club (conservation), AARP (the welfare of seniors), the National Right to Life Committee (prohibition of abortion), Common Cause (campaign finance reform), and the ASPCA (the welfare of animals).

Virtually all nonprofit membership organizations fill a significant gap by providing specialized education, to which

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2/ According to Internal Revenue Service data, in 1994 1,138,598 organizations qualified under federal tax-exempt law (which is a majority of the organizations formed under state nonprofit corporation laws). Of these 599,745 were charitable, educational, arts or religious organizations; 140,143 were cause-related social welfare organizations; 74,273 were

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professional societies or trade associations, 92,284 were fraternal service organizations, and so on. Independent Sector, *Nonprofit Almanac, Dimensions of the Independent Sector, 1996-1997* 38 (Independent Sector 1997).

they devote substantial resources. Membership education and training is the single largest budget item for organizations. See Public Opinion Strategies and Greenberg Quinlan Research, *The Value of Associations to American Society* (May 1998). One out of every four dollars these nonprofits spend is spent on either member or public education; 95 percent of all organizations offer educational programs to members, and 79 percent are involved in educating the public. *Id.* The CEOs of these nonprofits believe that education is the most important reason their members belong. *Id.* By providing current information and highly specialized training, these groups play an important role helping adults adapt their skills or learn entirely new fields in order to remain productive in a world undergoing rapid scientific and technological change.

Some nonprofits, like traditional educational institutions, have formalized certain areas of education and signify each person's successful completion of these programs by issuing a credential that informs colleagues and the public that the person has met the established requirements. Most accreditation of traditional educational and other institutions is also provided by nonprofit groups. For example, the National Association of Schools of Public Administration accredits public administration programs. The Joint Commission for the Accreditation of Health Care Organizations accredits hospitals. Some trade associations have established standards that those in their trade should meet in order to properly serve the public. Businesses that pass muster are given a credential that can be displayed to the public. Approximately 22 percent of nonprofits have established some type of credentialing program, and on average, that credential has been awarded to only one-quarter of their members. ASAE, *Policies & Procedures in Association Management* 13 (1996). Such programs generally impose higher standards than are imposed by government or impose

standards in fields or markets the government does not specifically regulate. In addition, they provide information to consumers who are ill situated to make their own assessments.

In the sciences, both pure and applied, membership organizations have long played a significant role in fostering scientific research. The American Association for the Advancement of Science holds symposia during which scientists present and discuss new research. Many professional societies, composed of members from one particular discipline, are primarily scientific organizations focused on encouraging, funding, publishing and discussing new research and theories in their respective fields. Their journals are frequently the premier scientific journals in the field. The pre-publication peer reviews, instituted and coordinated by these societies, provide readers with a significant measure of confidence in the quality of the work published. By serving as forums, publishing and holding symposia, these societies provide incentives that encourage research, the results of which advance our understanding and our ability to solve problems. Hudson Institute, *The Value of Associations to American Society* 80 (ASAE 1990) ["Hudson"].

Many nonprofits undertake research projects directly. The Healthcare Forum co-sponsored an investigation of methods to reduce the turnover of hospital nurses, a problem affecting patient care as well as hospital administration. Hudson at 86. Nonprofits' research is often of value to government entities which use the results for their programs. The American Institute of Physics, for example, provides statistics on scientific manpower to the Department of Energy, the Department of Defense, and NASA, among others. The National Council of Jewish Women has surveyed day-care facilities and the juvenile justice system, evaluated child abuse programs, and more. A

pilot program of the Council later became institutionalized as the federal Retired Senior Volunteer Program. *Id.*

Specialized education programs for the public are also services nonprofits can, and do, provide. The Chemical Manufacturers Association, for example, has a program to inform communities about the chemicals manufactured and stored in local plants and to coordinate area-wide emergency response, including early warning systems. It also provides callers with emergency information for responding to chemical incidents. Hudson at 45. The American Association of Neurological Surgeons and the Congress of Neurological Surgeons sponsors a national head and spinal cord injury prevention program aimed at educating teenagers and young adults about injury risks and methods of prevention. *Id.* at 106. The videos and other materials distributed by nonprofits regularly provide needed, specialized information to the public.

Another quasi-governmental role that is commonly undertaken in this country by nonprofits is setting standards. For example, the American Red Cross sets standards for the safe handling of blood products. Hudson at 50. Governments often rely on privately promulgated standards as the bases for codes they enact. The American Bar Association's Model Rules of Professional Conduct is an example well known to the legal profession. Most local building codes are based on standards developed by nonprofits. The Financial Accounting Standards Board promulgates Generally Accepted Accounting Principles (GAAP) which standardizes accounting so that companies, shareholders, or government can understand the assumptions and levels of review underlying accounting documents and establishes the analysis necessary to portray the financials of an enterprise under scrutiny. Other nonprofits serve similar functions less formally by providing the public with

information with which to make evaluations. For example, the American Institute of Philanthropy provides potential donors with ratings, opinions and other information on financial and managerial practices of a wide variety of charities. 1 Encyclopedia of Associations, pt. 2 at 11516 (Sandra Jaszcak ed., Gale Research 31st ed. 1996).

Finally, nonprofits provide a wide range of community services. Some, such as Kiwanis International, combine fellowship with community service. Others, such as the World Wildlife Federation, devote their efforts to working toward their vision of a better world for all. Organizations of individuals engaged in a particular line of work and organizations of businesses frequently use their special skills and access to help their neighbors. The Grocery Manufacturers of America, for example, organized a national network of food banks that donate and distribute more than 100 million pounds of food and other groceries annually. Hudson at 103. The anti-drug advertisements sponsored by Partnership for a Drug-Free America are provided through a program of the American Association of Advertising Agencies. It arranges hundreds of millions of dollars of free broadcast time and print space, as well as free production of the advertisements. *Id.* at 104. The National Association of Truck Stop Operators uses the truck stop network to identify and return missing children. *Id.* at 105. The National Association of Broadcasters has a program to retrain workers displaced from declining industries. *Id.* at 108.

Even these few examples demonstrate that nonprofit membership organizations are not only different in nature from for-profit commercial businesses, but also that they serve -- and have always served -- many needs that might otherwise fall to government, or through the cracks altogether. Further, there is a very broad and diverse spectrum of nonprofits in this country

and generalizations aimed at reaching some could easily, albeit unintentionally, pull in others of a very different character.

### SUMMARY OF ARGUMENT

The FTC has expanded its reach far beyond the jurisdictional scope envisioned by Congress. In the FTC's view, its jurisdiction extends to charities, environmental and other cause-related groups, professional societies organized to foster and disseminate scientific research, fraternal service organizations, and many other nonprofits Congress never intended to be regulated under the Federal Trade Commission Act. See 15 U.S.C. §§ 41 *et seq.* ["FTC Act"].

1. The plain meaning of the statutory language -- restricting the Commission's jurisdiction to corporations organized for someone's "profit" -- limits the FTC's reach to commercial businesses and sham trade associations. Pt. I.

2. Even if the term "profit" is accorded a more metaphorical import, the statutory language, supported by the legislative history, restrains the FTC from regulating nonprofits primarily dedicated to public purposes. Pt. II.

In the absence of guidance from this Court, the Commission has engaged in an expansive quest that has required charities and scientific groups to divert resources from their charitable and scientific work to legal defense, and discourages nonprofits from pursuing many public-minded programs that benefit consumers and the community generally. *Amicus* urges the Court to take this opportunity to clarify the scope of the FTC's jurisdiction.

### ARGUMENT

#### I. THE PLAIN MEANING OF "PROFIT" PRECLUDES FEDERAL TRADE COMMISSION JURISDICTION OVER GENUINE NONPROFIT GROUPS.

The statute restricts FTC jurisdiction over corporate-type entities. The FTC may investigate and discipline only an entity "which is organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. Under this definition, the FTC clearly has jurisdiction over commercial businesses, because they are organized to carry on business for profit. The Commission also has jurisdiction over cooperatives, because they are organized to carry on business for the profit of their members. It may also be arguable that the Commission has jurisdiction over a nominally nonprofit trade association that is actually organized to facilitate, for example, its members' price fixing on the ground that the nonprofit shell can be pierced when the association is -- in fact -- simply a vehicle for its members to realize profits. The Eighth Circuit has suggested that the FTC's jurisdiction would reach such a sham association. *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1019 (8th Cir. 1969) (FTC could "hold liable a non-profit corporation found to be the tool of corporations organized for profit which these corporations manipulate for evil ends").

The language of the statute, however, does not permit the FTC to reach *bona fide* nonprofit organizations unless the word "profit" is disregarded as a limitation. A *bona fide* nonprofit group is not, by definition, organized to carry on business for its own profit. Most *bona fide* nonprofit groups are also not organized to carry on business for the profit of their members. It is undisputed that these groups do not distribute profits to

their members. Indeed, if they are organized under federal tax-exemption law, they are prohibited from doing so.

For example, a nonprofit organization qualifies for federal tax exemption as a charitable, scientific, literary, public safety, educational, anti-cruelty, etc. organization not only because it has been organized exclusively to pursue the goals specified in the statute, but also because “no part of the net earnings of [the organization] inures to the benefit of any private shareholder or individual.” 26 U.S.C. § 501(c)(3). Likewise, a nonprofit organization qualifies for federal tax exemption as a business league (which includes associations of businesses in a particular area and many individual membership organizations) not only because it is a business league that is not organized for its own profit but also because “no part of the net earnings of [the organization] inures to the benefit of any private shareholder or individual.” *Id.* at § 501(c)(6). Nonprofit cause-related or advocacy organizations that qualify for federal tax exemption as social welfare groups, such as AARP, share the same significant characteristic: no part of the net earnings of such a group “inures to the benefit of any private shareholder or individual.” *Id.* at § 501(c)(4). Thus, these organizations, and many other nonprofits, *see, e.g.*, § 501(c)(7), (9), (11), (13), (19), (26) -- by law -- are *not* organized for doing business for their members’ profit, because the net earnings of their business activities may not inure to the benefit of their individual members or their business members’ shareholders.<sup>3/</sup>

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3/ These provisions were included by Congress in the first income tax law, which it enacted only one year before the provisions at issue here. *See Tariff of 1913*, Ch. 16, 38 Stat. 114, 172 (1913) (providing that charitable, scientific, educational, and religious associations, business leagues, fraternal beneficiary societies, civic leagues operated for the

The court below found that the FTC had jurisdiction over petitioner only by disregarding the ordinary and usual meaning of “profit” and therefore the limitation Congress imposed when it used that word. The Ninth Circuit recognized that organizations such as petitioner do not “distribute ‘gain’ to their members in the same sense as a for-profit corporation” and that “no genuine nonprofit entity does.” Pet. App. 16a. The Ninth Circuit also recognized that the “pecuniary benefits” to petitioner’s members, on which the FTC based its jurisdictional claim, were not actually profits but merely “a surrogate for ‘profit.’” Pet. App. 16a. The court below affirmed the FTC’s assertion of jurisdiction only by declining to apply the plain meaning of the statutory text, and applying a “more expansive view of ‘profit’ instead.” Pet. App. 15a-16a. *See also FTC v. National Comm’n on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975) (acknowledging that the organization only pursued profit for its members “indirectly”).

Because the traditional and generally accepted meaning of “profit” from carrying on a business is the amount of income received over and above the amount of expenses incurred, and because it is not even alleged that petitioner was organized to distribute such income to its members -- or that petitioner did distribute such income to its members -- the decision below should be reversed. Under the plain meaning of the statute, the FTC does not have jurisdiction over *bona fide* nonprofit groups.

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promotion of social welfare, and others were not subject to the income tax as long as they were “not organized for profit” and “no part of the net income of [the organization] inures to the benefit of the private stockholder or individual”).

## II. THE STATUTE ALSO LIMITS FTC JURISDICTION TO ENTITIES WHOSE PRIMARY PURPOSE IS CARRYING ON BUSINESS FOR THEIR OWN PROFIT OR THE PROFIT OF THEIR MEMBERS.

Even if this Court interprets the term “profit” as including indirect pecuniary benefits as well as net income, as the government urges, it should also address other limitations imposed by Congress in order to provide needed guidance to the FTC in determining which organizations are included and which are not. Operating without that guidance, the FTC’s view of its own jurisdiction in recent years has been expansive and expanding. The FTC has claimed jurisdiction to reach most nonprofit organizations. It has instituted investigations of major health charities, scientific groups, and more. And its view of its jurisdictional reach is still evolving. Whatever this Court’s interpretation of the term “profit,” the text of the statute establishes that the FTC was delegated jurisdiction only over organizations which have, as a primary purpose, the pursuit of profit for themselves or for their members. The legislative history supports such limits on the FTC’s role.

### A. The Statute

The FTC Act establishes the Commission’s jurisdiction over unfair competition through two provisions. Section 45(a) empowers the FTC to prevent “persons, partnerships, or corporations” – with certain listed exceptions – from engaging in unfair methods of competition. 15 U.S.C. § 45(a)(2). Section 44 defines “corporation” for purposes of the statute as: a company, trust or association -- whether incorporated or unincorporated, with or without shares of capital or capital stock or certificates of interest – “*which is organized to carry on business for its own profit or that of its members.*” 15

U.S.C. § 44 (emphasis added). Corporations and associations that are *not* organized for their own profit or that of their members are expressly excluded from the FTC’s jurisdiction.

This language stands in evident contrast to the language Congress used when it enacted the Clayton Act the same year as it enacted the FTC Act. And it is similarly different from the language Congress has used in other antitrust statutes. In the Clayton Act, Congress prohibited every “person” from engaging in tying, exclusive dealing, price discrimination or interlocking directorates. See 15 U.S.C. §§ 12-27. “Person” is defined, for purposes of the act, “to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.” *Id.* at § 12. In contrast to the FTC Act, no limitations whatsoever are placed on which corporations or associations are subject to the Clayton Act. Similarly, the Sherman Act had been expressly made applicable to all corporations and all associations. 15 U.S.C. §§ 1, 2, 7.

The jurisdictional provisions of the Robinson-Patman Act provide another useful comparison. In that Act, Congress prohibited price discrimination with respect to sales to all corporations and associations, among others, except sales of supplies to “schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit” for their own use. 15 U.S.C. § 13c. Thus, the Act’s prohibition applies to sales to commercial businesses, sales to individuals, sales to nonprofits other than those specifically listed, and sales to schools, libraries, hospitals, etc. of any goods the organization purchases for resale rather than use.

These jurisdictional provisions are instructive because of the contrast with the provisions in the FTC Act. When

Congress intended an antitrust law to reach all nonprofits, it expressly provided that the law would apply to all corporations and associations. When Congress intended an antitrust law to reach many types of nonprofits -- but not all -- it provided that the law applied to all corporations and associations except those in specific, listed categories. The FTC Act adopts neither approach, demonstrating that Congress did not intend it to reach either all nonprofits or all nonprofits other than charities. Instead, Congress defined a different, and more limited, jurisdictional scope: corporations and associations which *are organized* to carry on business for their own profit or that of their members. Commercial businesses are organized to carry on business for their own profit and are therefore clearly within the Commission's jurisdiction. Nonprofit organizations, however, only come within that jurisdiction if a primary purpose -- a purpose for which they are *organized* -- is to carry on business for the profit of their members.<sup>4/</sup>

Thus, wholly apart from any jurisdictional limits imposed by the term "profit," Section 44 excludes FTC jurisdiction over many types of nonprofits, such as charities, arts organizations, professional societies primarily devoted to education or to fostering scientific research, professional societies primarily devoted to other public purposes, fraternal service organizations, cause-related groups, and many others, because

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4/ This does not, of course, place large numbers of nonprofit organizations beyond the reach of the antitrust laws. Anticompetitive behavior will be discouraged by, and can be punished under, both the Sherman Act and the Clayton Act. Many nonprofits are also subject to the proscriptions of the Robinson-Patman Act. Moreover, most states have antitrust laws to which nonprofit organizations are subject. And both federal and state law provide private rights of action.

profit -- however defined -- is not an "organizing" or central purpose of the nonprofit.

## B. Legislative History

### 1. 1914

The House and the Senate did not initially agree as to the scope of the FTC's jurisdiction. The bill the House of Representatives passed defined "corporation" as "a body incorporated under law, and also joint-stock associations and all other associations having shares of capital or capital stock or organized to carry on business with a view to profit." H.R. 15613, 63d Cong. § 6, reproduced in H. R. Conf. Rep. No. 63-1142, at 11 (1914). In the House's view, the creation of the FTC was aimed solely at commercial businesses. Thus, the House Report explained that: "The whole theory of the creation of the commission has been to make it an efficient and useful independent body, concerned with the maintenance of proper supervisory relations of the Federal Government over industrial corporations engaged in interstate commerce." H. R. Rep. No. 63-533, at 8 (1914).

The Senate substituted its own bill, keeping the same definition of corporation. S. Rep.-No. 63-597, at 1 (1914). However, it added a separate section that increased the scope of the FTC's jurisdiction to "extend over all trade associations, corporate combinations, and corporations as hereinbefore defined engaged in or affecting commerce except banks and common carriers." *Id.* at 3. The Senate Report explained that

trade associations were to be “[s]pecifically subject to the jurisdiction of this commission.” *Id.* at 11.<sup>5/</sup>

The House refused to accept the Senate’s amendments and the jurisdictional question, among others, was referred to conference. The bill that emerged from the conference committee had deleted the Senate’s specific inclusion of trade

<sup>5/</sup> The government suggests that the impetus for expanding the FTC’s jurisdiction was a letter, dated August 8, 1914, from the Commissioner of the Bureau of Corporations complaining to Sen. Newlands, author of the Senate bill that the initial proposals could prevent the FTC from regulating trade associations. Opp’n Cert. at 11-12. The government’s source appears to be a reference in *Community Blood Bank*, 405 F.2d at 1017-18, to an unpublished letter submitted to that Court by the Commission. *Id.* at 1017 n.12. It is unclear what role, if any, such a letter played since it is dated *after* the Senate committee added “trade associations” to its version of the bill. See S. Rep. No. 63-597 at 1 (the Senate Report, with the new provision, issued June 13, 1914). Indeed, the full Senate had passed that version three days before the letter was written. 51 Cong. Rec. 13318-13319 (1914). In any event, the letter did not urge the inclusion of all nonprofits, or even all nonprofits other than charities. It urged only the inclusion of “associations of manufacturers or dealers (trade associations).” *Community Blood Bank*, 405 F.2d at 1017. Thus, whether the letter represented Sen. Newlands’ after-the-fact “papering” of the record or was actually read by the conference committee, it evidences that the expansion of FTC jurisdiction was envisioned as -- at most -- an expansion to associations of manufacturers and dealers, not an expansion to professional societies, scientific groups, service organizations, charities, or any other of the vast array of nonprofits.

associations and had added a phrase to the House version that placed within the FTC’s jurisdiction any corporation or association without stock “which is organized to carry on business for its own profit or that of its members.” H.R. Conf. Rep. No. 63-1142, at 3 (1914). The Conference Report’s explanation was that the various “definitions . . . remain substantially as in section 4 of the House bill.” *Id.* at 18. In other words, the conferees believed that they had adopted a scope of jurisdiction closer to the House Bill (which was limited to commercial businesses) than to the Senate Bill (which had included trade associations and commercial businesses).

Thus, the legislative history provides support for the view that Congress did not intend the FTC to regulate nonprofits unless they were mere vehicles for unlawful anticompetitive activities. Furthermore, the legislative history makes very clear that Congress never intended to provide the FTC with jurisdiction to regulate professional societies, scientific groups, charities, advocacy groups, fraternal service organizations, etc. The only nonprofits that any chamber even considered placing within the FTC’s jurisdiction were trade associations of commercial manufacturers or dealers -- a plan the Conference Committee receded from in order to reach compromise.

## 2. Subsequent Congressional Action

Twenty-one years ago, the FTC asked Congress to amend the FTC Act to expand the Commission’s jurisdiction beyond the limits Congress had imposed by placing nonprofits within the FTC’s scope. *Hearings on H.R. 3816 Before the Comm. on Interstate and Foreign Commerce*, 95th Cong. 69 (1977). The House Committee on Interstate and Foreign Commerce rejected the proposed amendment. H.R. Rep. No. 95-339, at 120 (1977). Rep. James T. Broyhill (R. N.C.) expressed his

approval of the Committee's rejection of the amendment on the House floor:

I am pleased that the committee has deleted one particularly offensive provision. That provision would have altered the term "corporation" under the present FTC law by including not-for-profit organizations. The effect of this major change would have been immediately to extend FTC authority to include regulation of not-for-profit organizations on the same basis as business corporations. That would have meant that every college and university, professional association, church, social club, philanthropy, charitable organization or any other voluntary membership or eleemosynary organization would have been subject to FTC regulation.

123 Cong. Rec. 33622 (Daily Dig. Oct. 13, 1977) (statement of Rep. Broyhill). Rep. Broyhill noted that nonprofits were "completely different from business organizations in purpose, intent, and 'ownership'" and that the "FTC itself provided a very weak case for the need or necessity of extending its already expansive ambit to encompass not-for-profit organizations." *Id.* In contrast, he noted, the American Dental Association and the American Medical Association, among others, had "presented a strong and convincing argument against inclusion in FTC authority." *Id.*<sup>6/</sup> Thus, as recently as 1977, Congress appears to have understood the FTC not to have jurisdiction over professional societies, charitable organizations, or any other nonprofit membership organizations.

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<sup>6/</sup> See also H.R. Rep. No. 95-339, at 120 (1977) (minority report) (explaining that the FTC's current jurisdiction is limited to profit-making bodies).

### C. The Commission's Expanding Sights

For many decades, the FTC asserted jurisdiction only over commercial businesses and, on occasion, a traditional trade association -- an organization of businesses engaged in a particular trade. *See, e.g., FTC v. Association of Flag Mfrs. of America*, 1 F.T.C. 55 (1918).<sup>7/</sup> More recently, with no change in its statutory empowerment, the FTC has assumed jurisdiction over professional societies, charities, and others. *See, e.g., Community Blood Bank*, 405 F.2d 1011; *American Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980) (affirming FTC's jurisdiction over the AMA), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

Since at least 1982, the Commission has taken the position that it is empowered to reach any membership organization that engages in more than incidental activities regarded by the FTC as potentially beneficial to its members. *See, e.g., Pet. App. 49a, 14a.* In the FTC's words, it has jurisdiction over any membership organization that engages in activities that generate a pecuniary benefit to its members, if those activities constitute "a substantial part of the total activities of the organization," Pet. App. 49a (internal quotations omitted). The Commission then defines "substantial" as anything other than "merely incidental." *Id.* Thus, in the FTC's view, it is not limited to regulating nonprofits that "are organized" to carry on business for the profit of their members; it is free to regulate any nonprofit that engages in more than "incidental" activities that can be viewed as potentially beneficial to its members.

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<sup>7/</sup> *Amicus* does not believe that the FTC's jurisdiction to reach even these traditional trade associations has been raised before, or addressed by, this Court.

The FTC has taken further steps to ensure that this low threshold standard will be met by many nonprofit groups by designating activities that serve the public interest as activities that are engaged in solely to provide "pecuniary benefits" to its members. For example, in *In re Michigan State Medical Society*, 101 FTC 191 (1983), the society's efforts to ensure that those treating patients had the benefit of information about recent discoveries and techniques were counted as activities providing profits to members because the continuing medical education programs were offered to members at a lower price than to nonmembers. The fact that the members had already paid the difference in price -- and more -- by paying dues, and the fact that the beneficiary of the education was the public, was wholly disregarded. *Id.* at 221.

In the decision below, the administrative law judge similarly counted scientific sessions, aimed at keeping those who treat the public abreast of new scientific information, as an activity engaged in merely to increase member profits because it was provided free to members. Pet. App. 254a. The public value of continuing to educate medical professionals, in whom lay people have no choice but to place their trust, was ignored (as was the fact that members had paid dues and were therefore not, in fact, receiving anything "free"). Similarly, the ALJ counted petitioner's publication of technical and scientific information to be another base effort to increase its members' profits. *Id.*

If not outright disingenuous, these classifications are at the least naive. Newer techniques may be less costly to patients than older ones. For example, current medical practices frequently allow patients to spend less time in hospitals than previously thought prudent; pharmaceuticals are now recommended where previous practice would have indicated surgery, and more. Further, many scientific papers and

publications involve basic science, or early stages of research, and are therefore of intellectual -- not practical -- value to the members. Providing medical practitioners with this kind of scientific and technical information may improve their understanding and even their skills (and therefore the public's health), but it can hardly be relied on to increase their profits.

Finally, petitioner's efforts to provide patients with a ready, and affordable, means of resolving complaints against dentists through a peer review system was classified as an activity for the purpose of increasing members' profits, because it "may provide a less costly alternative to traditional methods of resolving patient complaints about dental problems." *Id.* at 253a. The ALJ did not attempt to determine whether members were actually better off, much less whether the program was actually adopted to, and did, provide significant advantages to the public. Certainly, it is possible for a member to be better off if a patient who would win in court chooses to use the peer review system instead. But a patient who could win in court would be likely to find representation on a contingent basis. In more ambiguous situations, most patients are even less able to afford litigation than medical practitioners. The practitioners have malpractice insurance; the patients do not. Many patients, absent petitioner's program, would have no practical remedy. Thus, the allegedly self-serving program actually exposes its members to far more patient complaints, and potential liability, than does the court system. And it does so without relieving its members of any risk. Those patients able to afford representation to sue in court, or to obtain it on a contingent basis, retain the right to do so. It is ironic that, at a time when so many courts are encouraging parties to use alternative dispute resolution programs, the FTC would find a voluntary offer of such services -- to patients who cannot afford, or do

not wish, to sue in court -- to be an pecuniary benefit for those whose work and billing practices will be challenged.

Under this approach, virtually any activity -- however valuable to the public -- can be found by the FTC as providing "pecuniary benefits to members." The malleability of this category renders the FTC's low jurisdictional standard even less of an impediment to skirting Congress' limitation.

In 1994, the FTC improvised an additional jurisdictional standard that could bring nonprofits within its reach even if the nonprofit engages in *no* activities of arguable pecuniary benefit to its members. The FTC's view is that it has jurisdiction over such nonprofits if their fund-raising activities are not closely related, in nature, to their public purposes. *See In re College Football Ass'n*, 5 Trade Reg. Rep. ¶ 23,631, 23,357 (July 8, 1994); Pet. App. 50a. This test is not a means of requiring that the funds raised are used solely to further the nonprofit's public purposes. This test is only applied if the funds raised *are* used solely to further those public purposes. To meet the test, there must be an adequate nexus between fundraising that involves commercial activities and the public purposes to which the funds will be put. *In re College Football Ass'n* at 23,355. By its terms, the test places a PTA that holds a bake sale to benefit a school, or a health charity that sells second-hand furniture and clothing to raise money, well within the FTC's jurisdiction.

The FTC's attempt to justify this decision within the rubric of the jurisdictional scope Congress actually provided is curious. The FTC recognized that if a nonprofit did not engage in activities that, by anyone's definition, could be considered for the profit of its members, then the FTC only had jurisdiction if the nonprofit was organized for its own profit. *Id.* at 23,354. Nonetheless, the Commission did not reach the seemingly

inevitable conclusion that such a nonprofit was outside its jurisdiction. Instead, the FTC decided that "the source of the [nonprofit's] income provides another basis" for its jurisdiction. *Id.* at 23,355. The FTC could not derive support for this proposition from its own statute so it turned instead to the federal nonprofit tax statute and noted that, to be tax-exempt under the tax statute, an organization had to be both not organized for profit and its activities had to be of a certain type. *Id.* at 23,355-56. Thus, the FTC concluded, the same two-prong requirement is applicable to remove an organization from the Commission's jurisdiction. *Id.* at 23,357.

The FTC's reliance on federal tax law is curious for several reasons. First, although the tax statute, as the FTC found, does contain both requirements, the jurisdictional provision of the FTC Act does not. To be tax-exempt, an organization must not be organized for profit *and* must come within one of the enumerated tax-exempt categories. *See* 26 U.S.C. 501(c)(3). To be outside the scope of the FTC's jurisdiction, however, an organization need only not be organized for profit. Nothing in the FTC Act links jurisdiction to specific public purposes.<sup>8/</sup>

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<sup>8/</sup> The Commission's decision is also inconsistent with *Community Blood Bank*, which held that the only test for such a nonprofit was whether the organization derived profit for itself. Indeed, that court expressly found that the nature of the nonprofit's activities was "of no relevance." 405 F.2d at 1019. Thus, it explained: "A religious association might sell cookies at a church bazaar, or receive income from securities it holds, but so long as its income is devoted exclusively to the purposes of the corporation" it does not come within FTC jurisdiction. *Id.*

Moreover, the FTC's reliance on the federal tax-exempt statute is also internally inconsistent. For example, in fashioning the nexus test based on the allegedly parallel provisions in the federal tax statute, the FTC paid no heed to the fact that the organization at issue *met* the requirements of the tax statute, and was exempt from federal income tax. *In re College Football Ass'n* at 23,356. The FTC also regularly pays no heed to the tax code provision it found parallel with respect to membership profits. Although the FTC found Section 44's exclusion of groups not organized for the profit of their members parallel to the tax statute's exclusion of membership groups if no part of its net earnings inures to the benefit of its members, *id.*, the FTC maintains that organizations that meet the tax code standard are nonetheless organized for the profit of their members under the FTC Act.

#### D. The Need For Guidance

The FTC's current view of its jurisdiction permits it to investigate and discipline many organizations that have always, and rightfully, been considered beyond its reach. Many health charities, for example, have members, or are even primarily membership organizations. Members are often ex-patients, families of patients, concerned lay people, and a range of health professionals who treat patients with the disease with which the charity is concerned. *See Hudson* at 26. For example, the American Diabetes Association has, as members, a full range of health care professionals involved with treating diabetes. The Association engages in various activities to foster research through symposia and publications and to improve care through education programs. One of its educational programs is a course in educating diabetics on managing their disease. For completing this program, health care professionals are awarded a credential. The Association also operates an accreditation

program evaluating institutions that treat diabetics. Without further expanding its view of its own jurisdiction, the FTC could use any of these as a basis to exert jurisdiction.

Similarly, a committee within the American Lung Association is the American Thoracic Society, with members who are doctors, nurses, researchers and others in the health profession who work in the field. It holds symposia, during which doctors and researchers and others present and discuss papers. It distributes a newsletter and other medical and scientific publications. And it lobbies for increased research grants to the National Institute of Health. All these activities have previously been found by the FTC as providing pecuniary benefits to members, and nothing in the FTC's jurisdictional understanding would prevent it from exerting jurisdiction over the American Lung Association.

The United Leukodystrophy Foundation, dedicated to improving knowledge about and care for patients with these disorders affecting the brain, spinal cord and peripheral nerves, has members who are medical care professionals, families of patients, and organizations. The Foundation supports research into the causes, treatment and prevention of these disorders, sponsors educational programs about them, and identifies sources of medical care, social services, and counseling for patients and their families. Under the FTC's analysis, identifying sources of medical care for terrified patients is simply drumming up business for the Foundation's members, educating health professionals about these disorders is aimed at improving its members' job prospects, and funding research could be a way of channeling funds to members or a method for expanding their professional opportunities in the future.

The Hemochromatosis Foundation, dedicated to improving the prospects for those with a hereditary disorder of the metabolism that causes the body to accumulate iron, also has physician members along with patients and their families. Because the disorder is not well known, and can be fatal, the Foundation encourages routine use of screening tests by physicians, assists the physicians as well as patients and their families with diagnosis, treatment and genetic counseling, conducts periodic teaching days for physicians, patients and their families, conducts programs on current research, and is establishing a registry of those who have the disorder. Further, the Foundation provides a phone referral service for patients. Again, each of these could be mischaracterized as profit-enhancing for the Foundation's members. Arguably, encouraging testing and providing referrals increases physician members' business; educational programs improve their marketability; and assistance with diagnosis and treatment improves their success rate and efficiency.

A group organized to raise funds for a major symphony could, under the FTC's definition, be characterized as having substantial activities that benefit members -- and therefore within the FTC's jurisdiction -- if some of its members are also members of the orchestra or if members receive discounted tickets to concerts. A community arts council that sponsors art shows, and operates a community arts center with classes for all ages, could similarly be found within the FTC's claimed jurisdiction if some of its members are local artists or art teachers, or if members receive discounts on classes or at sales.

The FTC's nexus test brings other nonprofits, generally considered outside the scope of its jurisdiction, well within. The Girl Scouts of America seems unlikely to be able to show the required nexus between boxed cookie sales and the

organization's public purposes. The American Heart Association, which raises funds through a fine wine auction, faces the same problem, as would many other groups.

The FTC might also use the corporate relationships that many charities use to raise funds for research and public education as a basis to exert jurisdiction. The practice of forming some type of corporate relationships has become extremely common among charities and has often proven an effective fund-raising technique. For example, a few years ago the Arthritis Foundation permitted a pharmaceutical company to put the Foundation's name on a standard pain-relieving product for the treatment of arthritis, in exchange for a substantial contribution for research. The American Heart Association permits its "Healthy Heart" logo to be placed on food that is relatively low in fat, for which it receives funds that are used to defray some of the costs of its charitable activities. The Cancer Society has permitted its logo and telephone number to be used in advertisements and on packaging for the Nicoderm patch. Further, many charities permit commercial businesses, in return for significant contributions, to advertise that they are a sponsor of a particular fund-raising event.

Concern that the Commission would attempt to reach these types of nonprofits is not merely hypothetical. A few years ago, the Commission *did* investigate a major health organization that, in return for a sizeable contribution, had permitted a manufacturer to advertise that it was a sponsor of the charity. Ultimately, the FTC dropped its efforts against the charity, but not before imposing considerable costs for legal fees, responses to discovery requests, etc.

The FTC also targeted a national educational and scientific society of physicians for its policy of not permitting

corporations who advertised infant formula to sponsor educational and scientific events held by the society. The society's position was based on its view that breast feeding was healthier than formula for newborns -- a position incapable of enriching either the society or its members. Although, again, the investigation was eventually dropped, the society had to absorb the costs of legal counsel, responding to two rounds of document requests, and providing a number of depositions.

The FTC's assertion of jurisdiction over organizations clearly beyond its scope directs these organizations' resources into defending themselves from the Commission and away from the nonprofit activities that Congress has long since determined is in the public interest. The FTC's classification of useful pro-consumer efforts such as alternative dispute resolution services, scientific symposia and publications, and continuing education for those the public must rely on discourages nonprofits from developing and providing these programs. Furthermore, there are few charitable or pro-consumer programs that cannot be "recharacterized," so there are few, if any, inherent boundaries on the FTC's ability to circumvent its statutory limitations and its ability to discourage efforts capable of providing significant benefits for consumers, patients, arts enthusiasts, and everyone else whose needs and interests are served by the extraordinary variety of nonprofit groups.

Even the Solicitor General would apparently argue against the FTC's assertion of jurisdiction over charities. See *Opp'n Cert.* at 14. But although that limitation would curb some of the FTC extraterritorial explorations, it is insufficient. Had Congress wished to restrict the FTC's jurisdiction only with respect to charities, it would have said so, as it did in the Robinson-Patman Act. The FTC Act, in contrast, limits the FTC's jurisdiction solely to those corporations or associations

that are "organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44.

Congress, thus, imposed a primary purpose test. It did not provide that the FTC had jurisdiction over any nonprofit corporation or association that was engaged in more than *de minimis* activities that could "profit" its members. Congress provided that the FTC had jurisdiction only over those nonprofit corporations or associations that were *organized* for the profit of their members. Only if a primary purpose of a nonprofit organization is to "profit" its members can it come within the scope of the FTC's jurisdiction. Similarly, Congress did not empower the FTC to consider the manner in which nonprofit organizations raise funds to further their public purposes. Any organization that is legitimately qualified for tax-exemption as a nonprofit organization under the federal income tax laws should also be considered not "organized for its own profit" under the FTC Act.

Because the FTC's current approach is wholly inconsistent with Congress' statute and its goals, clarification by this Court of the FTC's jurisdictional limits is badly needed. Congress may well not have intended the FTC to regulate any *bona fide* nonprofit. It certainly did not intend the FTC to regulate nonprofits that are primarily engaged in pursuing public purposes. But, without guidance from this Court, the FTC's course threatens to divert more resources from public purposes and to discourage private groups from providing many public-spirited and extremely useful services that are beyond the present scope of government.

**CONCLUSION**

For the foregoing reasons, this Court should reverse the decision of the court of appeals below.

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November 10, 1998

No. 97-1625

(7)

In the  
**Supreme Court of the United States**

**October Term, 1998**

**CALIFORNIA DENTAL ASSOCIATION,**

*Petitioner,*

v.

**FEDERAL TRADE COMMISSION,**

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF THE STATES OF ARIZONA, ARKANSAS,  
 CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA,  
 IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN,  
 MINNESOTA, MISSISSIPPI, NEVADA, NEW HAMPSHIRE,  
 NORTH CAROLINA, OHIO, OKLAHOMA, OREGON,  
 PENNSYLVANIA, RHODE ISLAND, TENNESSEE, UTAH,  
 VERMONT, WASHINGTON, WEST VIRGINIA,  
 WISCONSIN AND THE COMMONWEALTH OF PUERTO  
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## INTEREST OF THE AMICI CURIAE

The 28 amici states and territory listed on the front cover (the States), by their attorneys general, file this brief as friends of the Court on behalf of the respondent Federal Trade Commission (FTC). The attorneys general are the chief law enforcement officials for their respective states and thus have a considerable interest in the issues this case raises before the Court.

In particular, the States have a vital interest in ensuring that the FTC has jurisdiction over trade or professional associations, like the California Dental Association (CDA), which engage in unfair or deceptive practices. The States, through their attorneys general, are charged with the duty of enforcing both antitrust and consumer protection laws. In discharging these duties, the attorneys general routinely investigate numerous allegations of illegal conduct by trade or professional associations and have brought many enforcement actions against such organizations. The attorneys general, however, lack the personnel and other resources necessary to investigate and prosecute all such activities which may threaten consumers. Therefore, they must rely on cooperation with the FTC in order to protect their citizens from unfair or deceptive practices. A holding that the FTC lacks jurisdiction over trade or professional associations would strain the resources of the States and increase the possibility that their citizens will be harmed by illegal conduct.

The States' interest in this Court's treatment of CDA's advertising restrictions is based on their stake in the principled application of the antitrust laws. The States themselves enforce both the federal antitrust laws within their respective boundaries and their own state antitrust laws. For the most part, moreover,

state antitrust principles closely track federal doctrine.<sup>1</sup> Thus, the flexible approach to the rule of reason that has developed in the federal courts has become a part of the antitrust jurisprudence of most states. To the extent that the Court clarifies or reformulates that approach, the States will be impacted in their own antitrust enforcement efforts. The abbreviated rule-of-reason analysis currently provides both federal and state antitrust enforcement agencies with a streamlined enforcement tool that can be used when a challenged arrangement has been shown to have a genuine adverse effect on competition. The alternative is a full-blown market analysis, which is both burdensome and unnecessary from a theoretical antitrust perspective in these circumstances. The States therefore oppose any change in application of the rule of reason that would signal a retreat from *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 460 (1986), where the Court made clear that not every violation of the rule of reason requires a detailed market analysis.

## SUMMARY OF ARGUMENT

1. FTC jurisdiction over not-for-profit professional associations that provide substantial economic benefits to their members is based on sound statutory interpretation of section 5 of the FTC Act, 15 U.S.C. § 45, and the legislative history of the Act. CDA is not a purely charitable institution and clearly acts in substantial part for the economic profit of its members, thus subjecting it to the FTC's jurisdiction. The exercise of

jurisdiction, moreover, is supported by case law as well as practical necessity. The States value the FTC's assistance in the enforcement of antitrust and consumer protection laws in matters involving professional associations, and a holding that the FTC lacks jurisdiction would seriously hamper these law enforcement efforts.

2. This Court has held that the rule of reason should be applied with flexibility, depending on the circumstances in which the potential antitrust violation has arisen. This is especially the case where, as here, the trier of fact has found actual adverse affects on competition from the targeted conduct. The courts of appeals, although not applying the rule of reason's flexibility with perfect consistency, have generally followed this Court's teaching, and their holdings support the approach adopted by the Ninth Circuit. The factual record in the case also provides a basis for implementing the flexibility of the rule of reason in such a way as to eliminate the need for an extensive market analysis.

## ARGUMENT

### I. THE FEDERAL TRADE COMMISSION PROPERLY EXERCISED JURISDICTION OVER A NONPROFIT PROFESSIONAL ASSOCIATION WHICH PROVIDES SUBSTANTIAL ECONOMIC BENEFITS TO ITS MEMBERS.

1. As the Ninth Circuit recognized, Pet. App. 14a, the text of the Federal Trade Commission Act encompasses an association, such as the CDA, which devotes a substantial part of its activities to creating economic benefits for its members.

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<sup>1</sup>See, e.g., 740 Ill. Comp. Stat. 10/11 (West 1996) (Illinois courts are directed to follow federal law where possible in construing the Illinois Antitrust Act).

Section 5 of the FTC Act grants the Commission authority to "prevent persons, partnerships or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45 (a) (2).

Whether and to what extent the Act applies to nonprofit associations turns on the definition of "corporation."

Section 4 of the FTC Act defines "corporation" as including:

any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

15 U.S.C. § 44. This text, separated into two clauses with the word "and," demonstrates that Congress intended for the FTC Act to cover two types of corporations: (1) a corporation -- incorporated or unincorporated, with capital or capital stock -- organized to carry on business for profit, and (2) a corporation -- incorporated or unincorporated, without shares of capital or capital stock -- organized for its own profit or that of its members. The first clause clearly only applies to for-profit corporations. But Congress did not so limit the second clause, defining corporation to include a corporation organized for its own profit or that of its members. Further, the word "and"

demonstrates congressional intent to extend the Commission's jurisdiction to cover for-profit corporations *and* corporations organized for the profit of their members.

The legislative history of the 1914 enactment of the FTC Act addressing the jurisdiction of the FTC confirms that the FTC has jurisdiction over a nonprofit corporation if the nonprofit corporation is organized for the profit of its members. The House's version of what became the FTC Act defined corporation as "a body incorporated under law, and also joint-stock associations and all other associations having shares of capital or capital stock or organized to carry on business with a view to profit." H.R. Rep. No. 63-1142, 63d Cong., 2d Sess., p.11 (1914). This definition of corporation, as opposed to the one adopted by the Conference Committee, severely limits the definition of corporation and, therefore, the jurisdiction of the Commission. Because under this definition, a corporation only includes a "body" organized "to carry on business with a view to profit" -- this definition would only apply to for-profit corporations.

The Conference Committee, however, rejected the House's definition of corporation. In its place, the Conference Committee agreed on a definition that included any company or association organized to carry on business for the profit of its members. This material alteration -- changing from a definition that includes only for-profits to a definition that is more expansive and includes nonprofits -- shows that the FTC's jurisdiction extends to a nonprofit corporation if the nonprofit corporation is organized for the profit of its members.

CDA asserts that the failure of Congress to enact a proposed amendment to the FTC Act in 1977 indicates that

Congress intended to exclude professional associations from the FTC's jurisdiction. Pet. Br. at 24-25. An examination of the legislative history of the proposed amendment, however, demonstrates that this assertion is mistaken. The proposed amendment would have redefined corporation as "any . . . corporation, or other organization or legal entity." *Proposed Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. On Consumer Protection and Finance of the House Comm. On Interstate and Foreign Commerce*, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1977). Testifying in favor of the definitional change, Calvin Collier, Chairman of the Federal Trade Commission, asserted, "the existing definition of 'corporation' has been judicially construed so as to hinder the ability of the Commission to challenge otherwise actionable behavior by certain nonprofit corporations." H.R. Rep. No. 95-339, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess., p.53 (1977). "This problem came to a head when the Commission began to challenge the activities of nonprofit corporations of a less traditionally commercial character." *Id.*

Discussing *Community Blood Bank of Kansas City Area, Inc. v. Federal Trade Commission*, 405 F.2d 1011 (8th Cir. 1969), Mr. Collier explained that the court held that "the Commission lacked jurisdiction . . . interpreting Section 4 [defining corporation] to exclude from Commission jurisdiction nonprofit corporations . . . which are organized for and actually engaged in business for only charitable purposes." H.R. Rep. No. 95-339, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1977) (internal quotations omitted). But Mr. Collier also explained that the Court "affirmed the Commission's jurisdiction over nonprofit corporations whose activities redound to the economic benefit of their shareholders or members." *Id.* According to the Chairman, the Commission's efforts to reach anticompetitive

conduct engaged in by nonprofit corporations "succeeded only after the often time-consuming proof that the respondent, whatever its nominal form, was in reality a conduit for essentially commercial interests." *Id.*, citing *Federal Trade Commission v. National Comm'n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975).

Based on this testimony, Congress was informed of two facts about the FTC's jurisdiction. First, if the FTC could prove that a nonprofit corporation was organized for the profit of its members, the FTC would have jurisdiction. Second, the FTC wanted to extend its jurisdiction to include even purely charitable organizations. Indeed, Congress described the provision testified in favor of by Chairman Collier as extending "application of the Federal Trade Commission Act to *all* nonprofit organizations." *Id.* at 18 (italics added). By rejecting the proposal, Congress demonstrated its intent not to extend the jurisdiction of the Commission to purely charitable, nonprofit corporations. However, Congress did not act to change the FTC Act even though Congress was clearly informed that the Act covered nonprofit corporations carrying on business for the profit of their members.

Comments in the Congressional Record on the proposed 1977 amendment also support this conclusion. Commenting on the amendments, a congressman remarked, "[c]learly, the original FTC law was not intended to cover non-business activities." 123 Cong. Rec. H. 33622 (daily ed. Oct. 13, 1977) (statement by Rep. Broyhill). "[D]uring hearings on the bill . . . [o]rganizations, including the American Association of Medical Colleges, the American Dental Association, and the American Medical Association pointed out the detrimental and potentially debilitating effects upon the non-business activities

of not-for-profit organizations that FTC regulation could have." *Id.* These statements evince congressional concern with FTC regulation of the *non-business* activities of nonprofit corporations. They do not evince congressional concern with FTC regulation of the *business* activities of nonprofit corporations.

2. While a nonprofit association by definition does not earn and distribute profits directly to its members or shareholders, it may undertake activities designed to create economic benefits for its members. When such activities occupy a substantial part of an association's resources, the association is carrying on business for the profit of its members. This is especially true when, as in the case at bar, the majority of the association's members are profit-seeking individuals or entities. Clearly, such an association falls squarely within the FTC's grant of jurisdiction.

This is not a case where the FTC is attempting to exercise jurisdiction over a purely charitable institution. The Commission has developed a fact-based inquiry to determine whether it has jurisdiction over an entity. If a substantial part of the organization's activities are designed to increase its members' profits, the FTC has jurisdiction. If such activities are only incidental to charitable functions, the FTC lacks jurisdiction.

This is also not a case where the FTC seeks to regulate the charitable, scientific, or educational activities of an association. The Commission's order relates solely to the CDA's advertising restrictions. Advertising is a commercial activity, through which dentists seek to increase their revenues.

The record in this case demonstrates that the CDA regularly acts to promote its members' economic interests. CDA's activities include lobbying, marketing, and providing advice on practice management and financial planning. Such activities clearly provide economic benefits to the CDA's members. Moreover, the majority of the CDA's members are dentists in private practice who are seeking to earn profits. The CDA, then, is carrying on business for the profit of its members and falls within the FTC's jurisdiction.

3. The decision of the Ninth Circuit is in accord with the decisions of other appellate courts which have addressed this issue. In a case involving very similar facts, the Second Circuit held that the American Medical Association was subject to the FTC's jurisdiction. *American Medical Ass'n v. Federal Trade Commission*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) (AMA). In that case, the AMA had adopted ethical guidelines regarding advertising and contracting which the FTC found to violate Section 5 of the Federal Trade Commission Act. The Second Circuit observed that the AMA promoted the business interests of its physician members through lobbying and providing financial advice. The court concluded that "[t]he business aspects of the petitioners fall within the scope of the Federal Trade Commission Act even if they are considered secondary to the charitable and social aspects of their work." 638 F. 2d at 448.

Similarly, the Seventh Circuit concluded that a nonprofit corporation whose members were egg producers was subject to the FTC's jurisdiction. *National Commission on Egg Nutrition*, 517 F. 2d 485 (7th Cir. 1975). The court stated that the

defendant was organized to promote the interests of the egg industry and thus fell under the definition of "corporation" in section 4 of the FTC Act. 517 F. 2d at 487-88.

Moreover, this Court has on several occasions upheld enforcement actions brought by the FTC against nonprofit trade or professional associations, although the jurisdictional issue was not expressly addressed. For example, in *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), this Court upheld a Commission finding that a boycott organized by an association of attorneys was anticompetitive. Similarly, this Court upheld a cease-and-desist order issued by the FTC against an association of dentists in *Federal Trade Commission v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (IFD).

CDA relies on *Community Blood Bank of the Kansas City Area, Inc. v. Federal Trade Commission*, 405 F. 2d 1011 (8th Cir. 1969), which it asserts to be in conflict with the Second Circuit's decision in *AMA*. In reality, however, there is no conflict. The Eighth Circuit recognized that Congress did not intend to exclude all nonprofit organizations from the FTC's jurisdiction. *Id.* at 1017. Rather, it held that the jurisdictional issue should be resolved on an ad hoc basis. *Id.* at 1018. The Eighth Circuit simply determined that, under the facts of that case, the blood bank involved was not an association organized for the profit of its members.

An examination of the facts in *Community Blood Bank* demonstrates that the purpose and activities of the blood bank were very different from those of the professional associations at issue in this case and *AMA*. The blood bank served the charitable purpose of coordinating blood supplies for hospitals

in the area. Moreover, the majority of the blood bank's members were themselves nonprofit corporations, unlike the private-practice dentists in the CDA. The community blood bank thus was a truly charitable organization which Congress chose to exempt from the FTC's jurisdiction.

4. Acceptance of CDA's argument that professional associations are exempt from the FTC's jurisdiction would severely curtail its enforcement efforts, both in antitrust and consumer protection matters. The FTC in recent years has identified anticompetitive practices carried on by numerous professional associations and instituted enforcement proceedings against them. *See, e.g., Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *IFD*, 476 U.S. 447 (1986); *Michigan State Medical Society*, 101 F.T.C. 191 (1983). The FTC has recognized, as have the States, that such associations provide fertile ground for the development of practices which harm consumers. Reversal of the Ninth Circuit's decision, however, would eviscerate the Commission's efforts to promote competition in the professions.

The States are concerned about the FTC's continued jurisdiction over nonprofit associations because a reversal of the Ninth Circuit's decision will increase the burden on the States and make it more likely that anticompetitive practices will be undetected. States have brought actions against trade or professional associations on numerous occasions. *See, e.g., Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) (including Reinsurance Association of America as a defendant); *California v. Ciba Vision Corp.*, Case No. 97-299-CIV-J-20A (M.D. Fla. filed Dec. 16, 1996) (naming American Optometric Association as a defendant); *State of Washington v. American Tobacco Co.*, Case No. 96-2-15056-8-SEA (Sup. Ct.

King Cty. June 5, 1996) (naming Council for Tobacco Research and Tobacco Institute as defendants). Nevertheless, the investigative and enforcement authority and resources of the FTC are an important deterrent to potential violators. The States therefore value the assistance of the FTC in promoting competition in the professions.

Reversal of the Ninth Circuit's decision would also eliminate the ability of the FTC to combat deceptive practices by professionals acting through a nonprofit association. For example, the FTC would be unable to challenge the activities of physicians who market a bogus medical treatment, as long as they form a nonprofit association. In this instance, the absence of enforcement authority could pose serious risks to the health and safety of consumers.

While some amici supporting CDA argue that the Department of Justice can adequately police antitrust violations in the professions, this reasoning has no application in the consumer protection context. The FTC is the only consumer protection agency at the federal level. As with antitrust violations, the States strive to protect their citizens from deceptive sales practices. With their limited resources, however, the States would be hard pressed to fill the void were this Court to determine that the FTC lacked jurisdiction in this important segment of the economy.

In conclusion, the Ninth Circuit properly held that the FTC had jurisdiction over a nonprofit association, such as the petitioner, which devotes substantial resources to creating economic benefits for its members. Such an association is not the type of charitable entity which Congress chose to exempt from the scope of the FTC Act.

**II. AN EXTENSIVE ANALYSIS UNDER THE RULE OF REASON IS NOT NECESSARY TO STRIKE DOWN PRACTICES WHICH, LIKE THOSE HERE, HAVE A PROVEN ADVERSE EFFECT ON COMPETITION.**

A flexible approach to the rule of reason allows a court to adjust the plaintiff's burden of proof depending on the circumstances of the case without violating fundamental antitrust concepts. The circumstances of this case demonstrate the wisdom of this approach and provide an opportunity for its application.

1. Several of this Court's decisions reflect that application of the rule of reason does not always require an extensive analysis of the market for the restraint at issue to be found illegal. The most enlightening language has occurred in the context of a restraint among members of an association. In *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), for example, the Court applied the rule of reason to an ethics rule that prohibited the members of a professional engineering association from submitting competitive bids. Rejecting the association's ethical justification, the Court observed that "no elaborate industry analysis is required to demonstrate the anticompetitive character" of the rule. 435 U.S. at 692.

In *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (NCAA), the Court addressed an arrangement among the members of an association to limit the number of college football games its members could televise. Although the Court ultimately disagreed with the

association's argument that the arrangement lacked market power, it rejected the argument as a matter of law. The Court said:

[T]he plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference. We have never required proof of market power in such a case. This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.

468 U.S. at 110. The Court did not go into detail as to all the circumstances that might justify "the absence of a detailed market analysis" in a rule of reason situation, but it did at least describe one such circumstance, namely, a "naked restraint on price and output."

The Court provided further elaboration in *IFD*, 476 U.S. 447 (1986). Although applying the rule of reason, the Court held that a detailed market analysis was not necessary to find illegal an agreement among member dentists of the defendant association to withhold x-rays from their patients' insurance companies. In so holding, the Court detailed facts and circumstances that are remarkably similar to those in the case now before the Court:

(a) Both cases involve rules adopted by a professional association of dentists to which the rule of reason was or has been deemed the appropriate mode of analysis. 476 U.S. at 458-59; Pet. App. 18a.

(b) In both cases, the practices targeted by the FTC did not involve price fixing as such but did involve an agreement among the dentists to withhold information -- x-rays in *IFD* and truthful pricing information here -- from consumers. 476 U.S. at 459; Pet. App. 18a-20a.

(c) In both cases, the dentists attempted to justify their conduct, among other ways, based on professional ethical considerations. 476 U.S. at 462-64; Pet. Br. 33-41. In *IFD*, the Court soundly dismissed this justification, stating, "[T]here is no particular reason to believe that the provision of information will be more harmful to consumers in the market for dental services than in other markets." 476 U.S. at 463.

(d) In both cases, the FTC did not purport to quantify the restrictions' effect on price and output. 476 U.S. at 461-62; Pet. App. 78a. In *IFD* the Court held that this failure was no bar to a finding of illegality:

A concerted and effective effort to withhold . . . information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence.

476 U.S. at 461-62.

(e) Most important, in both *IFD* and the case at bar the dentists argued that the FTC was obligated, but failed, to make

detailed findings regarding market definition and market power. In *IFD*, the Court held that the FTC's "failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason" because of other findings the FTC made. 476 U.S. at 460. Specifically – and this goes to the heart of the rule of reason's flexibility – the FTC had found that in two communities where a heavy majority of the dentists were members of the dentists' association, insurers had been unable to obtain compliance with their requests for x-rays. The Court characterized these facts as a "finding of actual, sustained adverse effects on competition." 476 U.S. at 461. Such a finding made an "elaborate market analysis" unnecessary, because the purpose of such an analysis in the first place was to determine if the questioned practice had an adverse effect on competition. 476 U.S. at 460-61. The FTC made comparable findings in the case at bar. *See* pp. 21-23, *infra*.

(f) Finally, in both cases the practices in question arguably were not "naked" restraints of trade. 476 U.S. at 460; Pet. Br. 30-31. Nevertheless, the Court in *IFD* held that its abbreviated approach would still apply.

Taking *NCAA* and *IFD* together, the States conclude that current antitrust jurisprudence allows courts to avoid an extensive market power analysis where the rule of reason is applicable but where the circumstances make such an analysis unnecessary. The Court has not provided a listing of all such circumstances -- and, indeed, a listing as such may be impossible in view of the flexibility needed for the rule of reason to adapt to different circumstances -- but at least two are where (i) the questioned conduct is nothing but a "naked" restraint on competition, or (ii) where the plaintiff has established an actual adverse effect upon competition even though the practice

cannot be characterized as a "naked" restraint. Use of an abbreviated market analysis, moreover, is not barred simply because the defendant's conduct is claimed to have some ethical or other benefit.

2. Since *IFD*, an abbreviated market power analysis has been properly used by the courts of appeals as well as rejected for both proper and improper reasons. The States thus welcome the opportunity for the Court to reaffirm and clarify this approach.

In two relatively early cases, the Seventh Circuit rejected an abbreviated, or "quick look," approach to deciding the matters before it. *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F. 2d 722 (7<sup>th</sup> Cir. 1986); *Vogel v. American Society of Appraisers*, 744 F. 2d 598 (7<sup>th</sup> Cir. 1984). While CDA relies on both cases throughout its Petition for Certiorari, they bear very little on CDA's situation. In *Vogel*, the case went to the Seventh Circuit on denial of a motion for a preliminary injunction, causing Judge Posner to comment that, on the basis of the "scanty record" before him, he could not condemn the conduct under consideration "before any evidence on its competitive effects has been produced." 744 F. 2d at 603-04. The only "quick look" he took, moreover, was to see whether the defendant's conduct – a gem association's elimination of fixed-percentage appraiser fees – could be characterized as price fixing, and he concluded it could not. 744 F. 2d at 603. There is nothing in the *Vogel* case inconsistent with the States' interpretation of *NCAA* and *IFD*.

*Illinois Corporate Travel* similarly came before the court on denial of a motion for a preliminary injunction. The plaintiff devoted most of its appeal effort to arguing that the defendant

airline's policy of refusing to allow travel agents to advertise that they would rebate a portion of their commissions to customers, was *per se* illegal. 806 F. 2d at 724. At one point, however, the plaintiff made an argument about the adverse effects of the defendant's policy, which Judge Easterbrook said might give rise to a "quick look" type of analysis. 806 F. 2d at 727. He nevertheless rejected the "quick look" approach because, he said, the practice at issue did not "facially" appear to be one that always or almost always would restrict competition, quoting *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979). While the States do not agree that the "quick look" approach is limited to facially invalid practices, the result in the case appears to have been driven in significant part by other factors, including the vertical nature of the relationship between the parties, the preliminary stage of the litigation, and the potential benefits of the defendant's policy. *See* 806 F. 2d at 728-29.

The next two Seventh Circuit cases implemented this Court's teaching on the flexibility of the rule of reason. *Chicago Professional Sports Limited Partnership v. National Basketball Association*, 961 F. 2d 667 (7<sup>th</sup> Cir. 1992), *cert. denied*, 506 U.S. 954 (1992) (*NBA I*); *Wilk v. American Medical Association*, 895 F. 2d 352 (7<sup>th</sup> Cir. 1990), *cert. denied*, 496 U.S. 927, 498 U.S. 982 (1990). In *Wilk*, the court found that the AMA illegally boycotted chiropractors. Its holding was based in substantial part on evidence of adverse effects on competition, which the court said "eliminated the need for inquiry into market power." 895 F. 2d at 360. In *NBA I*, the court applied the "quick look" doctrine to an NBA rule that limited the output of televised basketball games. The court explained its understanding of *IFD* "as holding that any agreement to reduce output . . . requires some justification . . .

before the court attempts an analysis of market power." 961 F. 2d at 674. Absent justification, the court said that the "quick look" version of the rule of reason should be applied, referencing Professor Areeda's "twinkling of an eye" quote cited in *NCAA*, 468 U.S. at 109 n. 39, and the Solicitor General's brief in *NCAA*, quoted at 468 U.S. at 110 n. 42.

Although the States do not quarrel with the overall approach taken in *NBA I*, a new twist was added to the Seventh Circuit's explanation in *United States v. Brown University*, 5 F. 3d 658 (3<sup>rd</sup> Cir. 1993). In that case the Third Circuit considered a collusive arrangement among Ivy League schools for the distribution of financial aid. The court ultimately held that, given the nature of higher education and the supposed pro-competitive features of the arrangement, the full-scale rule of reason should apply. 5 F. 3d at 678. Relying on *NBA I*, the court rejected the "quick look" doctrine under the following analysis: "If the defendant offers sound pro-competitive justifications . . . the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason." 5 F. 3d at 669. To the extent that this language may be read as suggesting that a mere assertion of a pro-competitive justification by the defendant should automatically require a thorough market analysis, the States feel that it is mistaken. In both *NCAA* and *IFD*, the defendants asserted justifications for their conduct, some of which can be characterized as pro-competitive, yet this Court nevertheless adhered to a rule-of-reason approach that did not require an elaborate industry analysis.

In two other cases, the courts rejected application of a shortened rule-of-reason analysis by solely focusing – unnecessarily in the States' view – on whether the targeted

restraint could be characterized as a "naked" one. *American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781, 789-90 (9<sup>th</sup> Cir. 1996) (payment of "yellow pages" ad commissions eliminated; "case does not present the type of naked restraint" that would justify "quick look"); *Lie v. St. Joseph Hospital of Mount Clemens*, 964 F.2d 567, 569-70 (6<sup>th</sup> Cir. 1992) (elimination of hospital privileges was not a naked restraint). In still two other cases, the courts declined to apply the "quick look" approach for reasons that find greater justification under *NCAA* and *IFD*, including the unusual market structure in which the challenged restraint had arisen, *Chicago Professional Sports Limited Partnership v. National Basketball Association*, 95 F.3d 593, 599-600 (7<sup>th</sup> Cir. 1996) (*NBA II*); and the absence of factual support for application of the approach, *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 n. 9 (3d Cir. 1996).

Finally, the Tenth Circuit made use of the rule of reason's flexibility in avoiding an extensive market analysis but still finding illegal an agreement among colleges to limit coaches' salaries in *Law v. National Collegiate Athletic Association*, 134 F.3d 1010, 1019-21 (10<sup>th</sup> Cir. 1998), *cert. denied*, 142 L.Ed. 51 (1998). The court explained that once a practice is found to have anticompetitive effects,

there is no need to prove that the defendant possesses market power. Rather, the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a 'quick look' rule of reason.

134 F.2d at 1020. Consistent with the States' interpretation of *NCAA* and *IFD*, the court then proceeded to address the

defendant's supposed procompetitive justifications for their agreement, and determined that they did not justify the anticompetitive conduct.

3. Under *NCAA*, *IFD* and the mainstream of court of appeals decisions, the States feel that the facts determined by the FTC in the present case represent a compelling opportunity for application of an abbreviated market analysis under the rule of reason.

The FTC made fact findings concerning the effect of CDA's policies on both price advertising and nonprice advertising. As to price advertising, the FTC found that CDA "precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts," Pet. App. 65a. As to nonprice advertising, the FTC found that CDA "prohibits all quality claims." Pet. App. 75a. For both types of advertising, the FTC found that CDA's prohibitions extended to truthful statements (Pet. App. 85a, 89a), that the type of information suppressed by CDA was important to consumers (Pet. App. 76a-77a), that the prohibitions "injured those consumers who rely on advertising to choose dentists" (Pet. App. 79a), and that the restrictions hampered dentists in their ability to attract patients and they reduced output (Pet. App. 78a). These general findings all had the support of many detailed underlying findings (see Pet. App. 63a-89a, 198a-218a, 224a-231a), including an analysis of nearly 400 CDA challenges to advertising representations (Pet. App. 235a, finding no. 282). The Ninth Circuit's opinion substantially confirmed the FTC's view of the facts.

The FTC also found that the restriction on price advertising constituted a "naked" restraint on competition. Pet. App. 67a. The Ninth Circuit went a step further and found that both the price and nonprice restrictions represented "naked" restraints. Pet. App. 18a, 20a. CDA devotes a major part of its brief trying to dispel the notion that its policies constitute a "naked" or "facial" restraint of anything and that, therefore, use of an abbreviated market analysis was error. Pet. Br. 31-41. CDA, of course, focuses on the text and purported purpose of its ethical rules, while the FTC and Ninth Circuit focused on how the rules were applied in practice. The Court can hardly agree with CDA on this point, for whether a restraint is a "naked" one or "facially" anticompetitive should not depend on its written, idealistic form. Indeed, if there were no written rule for advertising and the policy were left entirely to the CDA board to enforce on an ad hoc basis, CDA's position would preclude courts ever from finding the restraint "facially" anticompetitive.

Paraphrasing *IFD*, however, the States believe that "even if the restriction imposed by [CDA] is not sufficiently 'naked' . . . the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason." 476 U.S. at 460. The issue under *IFD* is whether there exists " 'proof of actual detrimental effects, such as a reduction of output,' " and if such proof does exist, it "obviate[s] the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.' " 476 U.S. at 460-61, quoting 7 P. Areeda, *Antitrust Law* ¶ 1511 (1986). Upon careful review of the record, both the FTC and the Ninth Circuit found the necessary detrimental effects. Their findings gave them the opportunity to apply the rule of reason with the same kind of flexibility that this Court demonstrated in *NCAA* and

*IFD* so as to avoid a prolonged, expensive and unnecessary analysis of market power.

While perhaps not critical to the outcome, the FTC and Ninth Circuit nevertheless went on to find that CDA has significant market power. Pet. App. 23a-24a, 78a-84a. In so finding, the Commission and court relied upon some of the same kinds of factors — e.g., professional membership in the association — that this Court used in *IFD*, 476 U.S.A. at 450-51, and that the Seventh Circuit relied on in *Wilk*, 895 F. 2d at 360 ("The district court properly relied on the AMA membership's substantial market share in finding market power"). The finding of market power confirmed the appropriateness of the "quick look" approach.

CDA vigorously protests that its advertising guidelines help to prevent deceptive professional advertising and increase consumer information. Pet. Br. 33-41. The States do not question that these procompetitive goals may have been a substantial part of the purpose of the guidelines. Although there is evidence in the record that the CDA also had an anticompetitive purpose (Pet. App. 191a-193a), the States do not think it necessary for the Court totally to reject the CDA's stated rationale. In *IFD* the Court noted conflicting evidence on the quality-of-care justification for the defendant association's policy, 476 U.S. at 464, and in *Wilk* the Seventh Circuit went so far as to find that the AMA's "dominant motivating factor" for its policy was "its concern about scientific method," 895 F. 2d at 363. These cases demonstrate that good motivation alone will not avoid a less-than-detailed market analysis under the rule of reason. *NCAA*, 468 U.S. at 101n. 23.

The major weakness in CDA's position is its failure to justify its broad categorical bans on forms of advertising important to consumers. Under *NCAA*, a restraint must be "tailored" to serve a legitimate procompetitive goal. *NCAA*, 468 U.S. at 119 (finding goal of promoting competitive balance among teams legitimate, but concluding that television plan was not tailored to serve that goal). *See also* P. Areeda, *Antitrust Law* ¶ 1505 (1986)(restraint must be reasonably necessary to achieve a legitimate objective). To serve a procompetitive goal in this case, CDA's advertising guidelines should have distinguished between misleading and nonmisleading statements and should not have swept so broadly. Recognizing the problem of overbreadth, the FTC's order made allowance for CDA's enforcement of guidelines directed to "false or deceptive" representations. Pet. App. 30a. Thus, CDA may continue to pursue the procompetitive aspect of its advertising policies. It is only that portion of its policies seeking to interfere with truthful advertising that the FTC cease-and-desist order affects.

In sum, the facts of record justify the analysis applied. While most rule of reason cases require a detailed market analysis, the abbreviated approach represents a practical and sensible way of analyzing a case where market power has been demonstrated through anticompetitive effects.

## CONCLUSION

The States respectfully urge the Court to affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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December 8, 1998

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No. 97-1625

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IN THE

**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1998**

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**CALIFORNIA DENTAL ASSOCIATION,**

*Petitioner,*

*v.*

**FEDERAL TRADE COMMISSION,**

*Respondent.*

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ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*  
and BRIEF OF  
THE CONSUMER DENTAL CHOICE PROJECT  
OF  
THE NATIONAL INSTITUTE FOR SCIENCE,  
LAW AND PUBLIC POLICY, INC.,  
AS *AMICUS CURIAE*  
IN SUPPORT OF RESPONDENT**

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In The

**Supreme Court of the United States**

**October Term, 1998**

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CALIFORNIA DENTAL ASSOCIATION,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent,*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**MOTION FOR LEAVE TO  
FILE BRIEF *AMICUS CURIAE***

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The Consumer Dental Choice Project of the National Institute for Science, Law and Public Policy, Inc. sought permission of both parties for leave to file this brief *amicus curiae*. The United States per letter of Solicitor General Seth

P. Waxman, consented. The California Dental Association, however, refused permission, and despite a specific request, refused to state its grounds for doing so.

Therefore, the Consumer Dental Choice Project moves that this Honorable Court accept this *amicus curiae* brief supporting the Federal Trade Commission as to the first issue, that the FTC ~~has~~ jurisdiction over professional associations.

First, petitioner has not consented to a single *amicus* on the other side. Even though the United States has graciously assented to several *amici* opposing its position, petitioner has taken the opposite "hardball" approach.

Second, there are no other non-governmental *amici* in support of the FTC. It is true that 27 state Attorneys General have filed an excellent brief in support of the United States, but certainly a brief from the private sector can add a dimension that a governmental body does not. With several private sector *amici* favoring the petitioner, the undersigned suggests the Court could benefit hearing from a private sector *amicus* on the government's side.

Third, the undersigned Consumer Dental Choice Project believes it has added unique arguments in support of the FTC, not otherwise raised by the Solicitor General or the state Attorneys General, arguments that could assist this Court in making a highly significant ruling. For example, this brief suggests that petitioner is asking the Court to depart from the spirit of its landmark *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), decision, which demolished, for antitrust purposes, a "learned profession" exception to the antitrust laws - and wisely so. And the undersigned also argues that the first issue of the petitioner has already been

decided through numerous cases, *sub silentio*, in favor of the FTC, and that there really is no conflict in the Circuits.

Finally, the Consumer Dental Choice Project will point out the ongoing anticompetitive practices of petitioner's affiliate American Dental Association and sister state dental associations in trying to destroy competition from dentists who use dental filling materials other than mercury, such as by promoting sham litigation by state dental boards. The ADA has held patents on dental amalgams, and its members appear to fear the growing ground swell from scientists and governments alike that mercury amalgams may be harmful. Indeed, it is no surprise that petitioner refused consent to a brief by the Consumer Dental Choice Project, because the latter has been so intensely critical of alleged anticompetitive practices in the area of mercury-based vs. mercury-free fillings. The Project has boldly suggested that advancing the profits of ADA and CDA members and maintaining its economic dominance as an association (not public health or consumer protection) constitute the rationale for the ADA and its state affiliates' anticompetitive practices against mercury-free dentists.

For the above reasons *amicus* asks that this motion be granted.

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In The

**Supreme Court of the United States**

**October Term, 1998**

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CALIFORNIA DENTAL ASSOCIATION,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent,*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

---

BRIEF *AMICUS CURIAE* OF  
THE CONSUMER DENTAL CHOICE PROJECT  
OF  
THE NATIONAL INSTITUTE FOR SCIENCE,  
LAW AND PUBLIC POLICY, INC.,  
IN SUPPORT OF RESPONDENT

---

## INTEREST OF THE *AMICUS CURIAE*

The Consumers for Dental Choice Project is a coalition sponsored by the National Institute for Science, Law and Public Policy, Inc. a Washington, D.C. based public interest organization that for more than twenty years has sought ways to ensure that governmental policy reflects emerging science.

The Project is challenging the American Dental Association's policy opposing mercury-free dentistry. Amalgams, by far the most common tooth filling material, contain about 50 percent by weight of the toxin mercury. The governments of Canada and Great Britain have cautioned their dentists against using it, especially for children, pregnant women, and people with kidney problems, and scientific studies increasingly suggest the harm of the metal and that its vapors could adversely affect large segments of the citizenry. A growing minority of dentists in the United States now refuse to use mercury fillings.

The ADA long held patents on amalgams (Patent #4,018,600 and Patent #4,078,921, now expired). Simultaneous with the holding of patents, but without referencing the organization's self interest, the ADA adopted an advisory opinion to its Code of Professional Conduct which seeks to prevent mercury-free dentists from discussing their practice with their patients or the public:

Based on available scientific data, the ADA has determined that the removal of amalgam restorations from the non-allergic patient for the alleged purpose of removing toxic substances from the body, when such treatment is performed solely at the recommendation or suggestion of the dentist, is improper and unethical.

## Advisory Opinion to ADA's Code of Professional Conduct, Section 5.A.

The ADA has subsequently acted in close coordination with state dental boards -- whose membership is overwhelmingly made up of ADA members -- to harass dentists who are mercury-free. Such dentists have been forced to go to great expense and public embarrassment to defend practices that are legal under state law but arguably contrary to ADA policies. It is important to note that the ADA is seeking to impose such policies on non-members, and despite the fact that in all but one state (Iowa), no state statute or regulation requires or prefers amalgam use. Indeed, many state boards have adopted policies declaring neutrality on the issue of what filling material a consumer may use.

Consumers for Dental Choice Project, created in 1996, is a coalition composed of mercury amalgam victims, scientists, dentists, physicians, and interested citizens, along with several national organizations: Dental Amalgam Mercury Victims, Inc. (DAMS), a New Mexico nonprofit corporation based in Virginia Beach, Virginia, whose members or family members have suffered from chronic diseases emanating from mercury amalgams; Citizens for Health, based in Boulder, Colorado, a national organization with over 100 chapters whose goal is health freedom, including freedom of choice in filling materials; the International Academy of Oral Medicine and Toxicology, based in Orlando, Florida, a scientific-based organization of dentists, physicians, and scientists who have concluded that mercury fillings are adverse to public health; and the Holistic Dentists Association, based in Spokane, Washington, a national organization of dentists who focus on the health of the patient over the cosmetic appearance of the teeth.

## SUMMARY OF ARGUMENT<sup>1</sup>

Petitioner would seek to turn the antitrust clock back to re-creating a “learned professions” exception to the antitrust laws. Two decades ago, this Court turned aside such an approach to antitrust enforcement. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Now, petitioner asks the Court to re-create that special exemption from antitrust enforcement for professionals when their restraints of trade or deceptive practices occur in the context of their “professional societies,” i.e. trade associations of for-profit business entities who hold a particular kind of license. While a professional association, like any other trade association – or any other business entity, for that matter – may include more lofty-sounding goals in its mission statement, no economist – and probably no trade association executive either – would quarrel with the concept that the association exists first and foremost to advance the economic goals (“profits”) of its membership.

To exempt professional associations would carve a huge segment of the economy away from FTC jurisdiction, the same concern the Court expressed in *Goldfarb*. A likely definition of a “professional” is one licensed as one. A state is likely to license two dozen or more professions, giving huge numbers of economic actors a freer hand to violate the antitrust laws. The state Attorneys General concede that they are much less likely to apprehend such violators without maintaining their strong partnership with the FTC.

That the FTC’s jurisdiction extends to professional associations has already been accepted by the courts – there

is no conflict in the Circuits. The FTC may not reach associations whose members are primarily nonprofit companies, a plain reading of the statute, which allows jurisdiction only where either the entity or its members are engaged in business for profit. *Community Blood Bank v. FTC*, 405 F.2d 1011 (8<sup>th</sup> Cir. 1969). The Ninth Circuit, in the case below, fully accepts *Community Blood Bank* as good law, holding that the FTC’s jurisdiction – again, based on a plain reading of the statute – applies to associations composed of members engaged in business for profit. It notes that dental associations are much like medical groups in that regard. *American Medical Association v. F.T.C.*, 638 F.2d 443 (2d Cir. 1980), *aff’d by an equally divided Court*, 455 U.S. 676 (1982). So *Community Blood Bank* (8<sup>th</sup> Circuit), *AMA* (2<sup>nd</sup> Circuit), and *CDA* (9<sup>th</sup> Circuit) are all in accord with each other.

FTC jurisdiction over professional trade associations appears to have also been accepted *sub silentio* by this Court. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990). With such a litany of cases, Congress has had plenary opportunities to shield professional associations from FTC jurisdiction – and, of course, it could still do so. But it has not.

The American Dental Association and its state chapters are aggressively battling individual dentists and rival dental associations who compete with their members. The most intense part of this economic strife is over whether fillings should contain the toxin mercury. The ADA, who has long held patents on amalgams (since expired), proclaims them safe, and encourages sham litigation by state dental boards against dentists who hold the opposing view. Although the health departments of other nations, such as Canada and

<sup>1</sup> In this brief, *amicus* addresses only the first issue in the writ, whether the FTC has jurisdiction over nonprofit professional associations.

Great Britain, have warned that amalgam use may be unsafe, the ADA – perhaps spurred forward to protect their members from liability – continues to proclaim amalgams safe and support prosecuting those who do not. Because the ADA's membership includes half of all dentists, a dominant market share, and because its state chapters may have even a much higher percentage (petitioner CDA's membership includes 75 percent of California dentists), it is by far the more powerful in any economic competition. To absolve the ADA from being subject to FTC scrutiny would be unfair to consumers who deserve choices in their public health and dental services.

The ADA also uses its seal of approval on a large number of products. If petitioner prevails, and if the ADA then engages in deceptive advertising practices in marketing its seal – and it has a record of standing by its sponsors when the FDA has challenged the product on public health grounds – no federal agency would exist to protect American consumers.

## ARGUMENT

### I.

#### **The “Learned Profession” Immunity to the Antitrust Laws Was Buried Decades Ago and Should Not Be Resurrected.**

Ignoring the last quarter century of antitrust case law, petitioner would have this Court re-carve a special role for professional associations. Indeed, petitioner presents itself before the Court much as the Virginia State Bar did in *Goldfarb v. Virginia State Bar*, 421 U.S. 778 (1975). As Chief Justice Burger stated, in his unanimous opinion for the Court, the bar argued “enhancing profit is not the goal of

professional activities; [rather] the goal is to provide services necessary to the community.” *Id.* at 786. The California Dental Association echoes the same theme when it tries to classify its work as community-oriented.

For the Virginia State Bar in 1975, the argument “loses some of its force when used to support the fee control activities involved here.” *Id.* For petitioner CDA in this case, its usage of advertising rules to reduce competition among its members likewise “loses the force” of its argument about acting like an eleemosynary corporation.

Lawyers and dentists compete in the marketplace. They enjoy no immunity. The major purpose of the trade associations formed by professions is the same as the purpose of trade associations formed by butchers, bakers, and candlestick makers, a fact recognized by Adam Smith back in 1776: to make profits. Smith, *Wealth of Nations*. Smith, the apostle of modern capitalism, stated that competitors most commonly get together to collude, not to improve themselves.

Professions encompass a huge segment of today's marketplace. Dentistry, being descended from Nineteenth Century barbers, is not a traditional learned profession. It is a “profession” because state laws so defined it. In fact, states define dozens of other “professions” the same way. West Virginia, for example, licenses at least 27 professions: accountants, architects, landscape architects, barbers, beauticians, chiropractors, contractors, dental hygienists, dentists, foresters, funeral directors, hearing aid dealers, lawyers, licensed practical nurses, registered professional nurses, nursing home administrators, occupational therapists, optometrists, osteopathic physicians, physical therapists, physicians, physician assistants, podiatrists, professional

engineers, psychologists, surveyors, and veterinarians. Holmes, West Virginia Blue Book (1996).

If dental associations become exempt, so will the associations representing all of those professions. As the state Attorneys General point out in their brief, to remove the FTC from this arena will severely hurt overall antitrust enforcement, and will remove the associations totally from federal consumer protection oversight as well.

## II.

### **No Conflict in the Circuits Exists; FTC Jurisdiction over Professional Trade Associations with For-Profit Members Has Long Been Accepted by Congress, the Courts, and Even the American Dental Association.**

No conflict in the circuits exists. The language of the FTC Act is simple, clear, and consistently decided by the Circuits.

The plain language of the statute makes it clear that professional associations are subject to FTC jurisdiction. Section 4 of the FTC Act, 15 U.S.C. 44, established the FTC's jurisdiction over entities "organized to carry on business for its own profit *or that of its members.*" If Congress wanted to limit jurisdiction to for-profit businesses, it would have said so. It did not. It reaches those entities organized to carry on profit for its members. It is hard to find a more accurate and succinct definition of a trade association, including one operating under the guise of a "professional" association, than those very words.

*Community Blood Bank v. FTC*, 405 F.2d 1011 (8<sup>th</sup> Cir. 1969), held that a trade association consisting overwhelmingly of nonprofit members was not covered by Section 4 of the FTC Act, a ruling plainly called for in the language of the statute. The association could not exist to promote "profits" of members not organized for profit.

*American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982), was a straightforward case of a trade association of for-profit members, so jurisdiction by the FTC was found.

The case before this Court, *California Dental Ass'n v. FTC*, 128 F.3d 720 (9th Cir. 1997), had essentially the same facts and therefore the same holding. The Ninth Circuit correctly noted that the AMA is an organization much more like the CDA – both of whose membership are profit-seekers – than either is like the Community Blood Banks of Kansas City. Petitioner's Writ for Certiorari at 15a. The Ninth Circuit *agreed* with the Eighth Circuit's *Blood Bank* decision, that truly charitable corporations are exempt from FTC jurisdiction, and stated that the FTC was acting as it did in its prosecution of the AMA, because in both *AMA* and *CDA*, the Commission's concern was "behavior directly affect[ing] the profitability of its members' practices." *Id.* at 16a.

The Seventh Circuit is operating on the same page. In *FTC v. National Commission on Egg Nutrition* 517 F.2d 485, the Court upheld jurisdiction, even noting that efforts to increase egg consumption was pursuing profits of its members. Analogously, the CDA promotes dentists generally, and the ADA promotes mercury amalgams in particular; see Section III, below.

Petitioner and its *amici* are simply incorrect in suggesting that a conflict in the circuits exists. Indeed, *amicus* American Dental Association recognized that it is subject to Section 4 for its numerous business (but not its charitable) activities – and, clearly, putting restrictions on advertising is a business activity. During the Congressional debates in 1977, when the FTC sought to expand its jurisdiction to the nonprofit world generally, the report by Congressman Broyhill indicates concerns by the American Medical Association and American Dental Association about having their *non-business* activities reached by the FTC. Acknowledged throughout was the FTC's jurisdiction over their *business* activities.<sup>2</sup> So no change in law in 1977 meant all sides accepted the status quo: the FTC continued to have jurisdiction over business activities of professional and other trade associations. See H.R. Rep. No. 95-339 (1977).

In antitrust law, this Court has given strong weight to Congressional inaction. *Flood v. Kuhn*, 407 U.S. 258 (1972). The baseball incongruity remained because Congress passed over plenary opportunities to change it. Here, Congress is well aware that the FTC frequently investigates and occasionally prosecutes professional associations. Congress could have interceded to change the law, but has not.

In 1998, six decades after court-made immunity was granted baseball, Congress wrote a special law repealing antitrust immunity for player contracts but preserving it in other areas – and graciously named the statute after the late

<sup>2</sup> Likewise, the American College of Alternative Medicine (to which some members of Consumer Dental Choice Project belong, and with which CDCP shares significant views on current medical controversies), at first denied FTC jurisdiction over its activities and filed an *amicus* brief in this case – but last week accepted Commission jurisdiction by agreeing to a consent order in a case brought against it by the FTC.

Mr. Flood. Congress will, therefore, act to change established antitrust case law if it disagrees. But petitioner has not pointed to a single bill indicating Congressional interest in preventing the FTC from continuing its decades-long pursuit of professional associations engaged in either unfair methods of competition or deceptive acts and practices. 15 U.S.C. 45(a).

Indeed, even this Court appears to have accepted, *sub silentio*, FTC jurisdiction over professional trade associations. In the 1980s and again in the 1990s – after establishing in the 1970s that there is no “learned profession” exception – the Supreme Court upheld Commission findings of antitrust violations by such associations. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990).

### III.

#### **The American Dental Association and Its Member State Associations (such as Petitioner) Are Aggressive Marketplace Participants Securing Profits for Their Members, Including Taking Major Anticompetitive Steps to Drive Nonmember Dentists out of Business.**

The American Dental Association is an economic colossus, with half of American dentists as members and the most comprehensive product endorsement of products of any organization in the nation.<sup>3</sup> The ADA and its member state associations are engaged in major steps both to advance the

<sup>3</sup> In total contrast to the ADA's massive product endorsement campaign, the American Medical Association considers the endorsement of products to be unethical and has a policy against doing it.

profitability of its members – such as the advertising campaign whose impact was effectively unmasked by the Commission – and in driving out of business those dentists who are critical of ADA policies.

#### **A. The ADA Has a Massive Anticompetitive Campaign Against Mercury Free Dentists.**

The ADA was founded in the 19<sup>th</sup> century, besting a rival group of medically trained providers to become the major trade group for dentists. The basis for its creation was the use of mercury-based fillings, known today as amalgams or “silver fillings.” They remain by far the most common filling material in the United States. Despite the growing aversion to using mercury in any other use that could come in touch with the human body,<sup>4</sup> the ADA continues to insist that filling materials containing 50 percent mercury is safe. Other nations are less certain, and governments such as Canada, Great Britain, and Sweden are acting to stop its use, especially with vulnerable populations such as children and pregnant women.<sup>5</sup>

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<sup>4</sup> Examples of banning mercury use, except in the teeth, are widespread. Recently, the FDA banned the use of products such as “Mercurachrome,” a mercury-based product to treat cuts. Mercury is no longer used to treat syphilis, because oral ingestion is so dangerous. Environmental officials attempt to safeguard against any dumping of the product. California voters have ratified a proposition requiring the posting of notices when mercury is used in dental offices, a move opposed by the ADA.

<sup>5</sup> The Canadian Health Department wrote a letter to all of that nation’s dentists urging them to stop giving amalgams to children, pregnant women, people with kidney problems, people with other metals such as braces, and people exposed elsewhere to mercury. The British government, noting a link between miscarriages and the placement of amalgam filings, took steps to stop its use for pregnant women. Sweden is stopping all use of amalgams.

Based on scientific research that directly conflicts with the ADA’s assurance of mercury amalgam safety, many American dentists now refuse to use mercury in filling materials. Those who are vocal about it frequently face investigations and even prosecutions by state dental boards, whose membership is substantially ADA and state dental association members. The latter have initiated cases to stop dentists from conveying information to the public that could question the pro-amalgam policies of the dentist majority. Most alarming to the boards, it appears, are those dentists whose message is successful enough that patients in large numbers are now abandoning ADA-members in favor of mercury-free dentists. These latter dentists almost invariably are not ADA members.

The ADA works closely with dental board to promote prosecutions of such dentists, even when it is manifest that the dentist is plainly within his or her First Amendment rights. The ADA supplies “expert” witnesses and even will bring its own attorney to the proceeding. Recently, in both Florida and Maryland, cases against dentists were dismissed after the Attorney General’s office advised the Dental Boards that they must comply with the First Amendment. But the ADA remains undeterred.

While telling the public that mercury amalgams are “safe,” the ADA does not simultaneously disclose that it has held at least two patents on mercury amalgams: Patent #4,018,600 and Patent #4,078,921. Such a conflict of interest illustrates the lengths the ADA will go to promote the profits of its members – and perhaps protect the latter from civil liability as well where amalgam causes health problems.

**B. The ADA Is Such a Powerful Endorser of Dental Products that It Is the Gatekeeper for Who May Effectively Compete.**

The ADA endorses all manner of products that could be used in the mouth, receiving compensation for such endorsements. It is able to use the funds from such royalties to attack mercury-free dentists, to lobby, to promote its brand of dentistry, and otherwise advance the economic interests of its members.

The ADA seal of approval is a make-or-break matter for many new products. Endorsement can be the prerequisite for successful marketing of products dealing with the oral cavity.

Once endorsed, the ADA stands behind the product even when a governmental agency warns about its deleterious effect on public health. When the FDA determined that fluoridated toothpaste should no longer be given to children (if a child swallows fluoridated toothpaste, the FDA advises parents to call the nearest poison control center), it required warning on the toothpaste tube and box. It was not surprising that the toothpaste companies objected. But the ADA, faced with choosing to support the FDA in its pursuit of protecting children's health, or stand by its sponsors, chose the latter, issuing a public statement against the FDA.

**CONCLUSION**

*Amicus* asks this Court to affirm the Ninth Circuit decision. The California Dental Association, the ADA, and other state associations are major market participants whose programs clearly demonstrate, as was proved in the record below, that they are organized to carry on business for the profit of their members. It would be a major mistake for this Court to change what is already accepted law – expressly in the Circuits, where there is no conflict, and *sub silentio* by this Court, and change what should be left to Congress, who has never shown any desire to do so.

It is to the great credit of this Court that it ended the antitrust “learned profession” exemption a generation ago, meaning professionals are subject to the same rules on competition as the rest of society. The Court should turn a deaf ear to those who wish to give professionals license to restrain trade or engage in deceptive practices under the thin gauze of their trade associations.

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## In the Supreme Court of the United States

OCTOBER TERM, 1998

CALIFORNIA DENTAL ASSOCIATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

**BRIEF FOR THE NATIONAL COLLEGIATE  
ATHLETIC ASSOCIATION  
AS AMICUS CURIAE  
NOV 10 1998 IN SUPPORT OF REVERSAL**

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## QUESTION PRESENTED

This brief addresses the second question presented:

Whether a court may enter judgment that a challenged practice violates that antitrust laws under the rule of reason after an abbreviated “quick look” analysis, without a showing (i) that the practice reflects an exercise of market power or produces actual anticompetitive effects, and (ii) that the proffered procompetitive justifications are so facially implausible that the challenged restraint may be regarded as naked rather than ancillary.

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**BRIEF FOR THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF REVERSAL**

**INTEREST OF THE AMICUS CURIAE**

The National Collegiate Athletic Association (NCAA) is an unincorporated, nonprofit association of more than 1100 colleges, universities, and athletic conferences engaged in intercollegiate athletic competition.<sup>1</sup> The NCAA was founded in 1906 to regulate intercollegiate athletic programs and contests to assure safer and fairer competition between schools. "One of the NCAA's fundamental policies is to maintain intercollegiate athletics as an integral part of the educational program \* \* \* and by so doing, retain a clear line of demarcation between college athletics and professional sports." *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988) (internal quotation marks omitted). To that end, the NCAA exercises limited authority over its members' athletic programs to preserve equity in competition among student-athletes and their schools.

To produce and market the "product" of college sports, the NCAA must function as a joint venture among colleges and universities. No academic institution acting unilaterally could maintain an organized series of competitive athletic contests between colleges. And no single college could keep its athletic programs appropriately situated within a broader context of academic experience, unless it was willing to renounce all hope of athletic success against schools less devoted to that goal.

The NCAA is concerned with the second question on which this Court granted certiorari. That question calls on the Court to decide how antitrust courts should apply "quick look" analysis under the rule of reason.

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<sup>1</sup> Pursuant to Sup. Ct. R. 37, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by the NCAA and was written entirely by its counsel.

The proper application of the antitrust laws to collaborative undertakings is acutely important to the NCAA. In numerous antitrust lawsuits, including one that has reached this Court, plaintiffs have attacked cooperation among NCAA member institutions. It is settled that such cooperation is generally not to be judged under *per se* rules, because substantial cooperation is necessary for amateur college sports to exist at all: “[w]hat the NCAA and its member institutions” produce and market “is competition itself — contests between competing institutions” that constitute a “particular brand” of sports. *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984). Nevertheless, this Court concluded that the restraint at issue in *Board of Regents* could be condemned under what has come to be known as a “quick look” rule of reason, and antitrust plaintiffs have attacked other NCAA rules under the same approach. Proper understanding of the limits of the “quick look” is therefore important to the NCAA.

The NCAA also has an interest in this case because in many respects it acts, like the California Dental Association, as a joint standard-setting organization. The NCAA sets standards for the conduct of college athletic competition both on and off the field. In that role, and because its membership consists of academic institutions led by professional educators, the NCAA also resembles nonprofit professional associations like petitioner in this case.

This Court and the lower federal courts have come to understand that snap judgments do not do justice to the complex competitive issues presented by joint ventures, standard-setting organizations, and professional associations. As a result, antitrust analysis of these types of collaborations has become increasingly sophisticated.

A “quick look” analysis that lacked principled underpinnings could reverse this salutary trend. Courts generally have applied some form of the rule of reason, and often have applied a “quick

look,” to NCAA rules and policies.<sup>2</sup> The most significant recent use of a “quick look” produced a broad injunction in *Law v. NCAA*, 134 F.3d 1019 (10th Cir. 1998), cert. denied, 67 U.S.L.W. 3230 (Oct. 5, 1998) (No. 97-2004), pet. for rehearing pending. The finding of liability that underlay the injunction has produced a \$67 million award of damages that will be reviewed by the Tenth Circuit on appeal.

If this Court reaches the second question presented and thus addresses the antitrust analysis undertaken by the court of appeals, the Court will have to reassess the rule of reason in general and the “quick look” in particular. The Court’s rulings may determine whether the NCAA can operate effectively and efficiently in the future, or whether instead it must relinquish its role in regulating not just the rules of play, but also the economic inputs to intercollegiate sports. Unprincipled application of the antitrust laws threatens not only the NCAA’s ability to place limits on the conduct and compensation of athletes and coaches, but also its specifications for uniforms, equipment, season length, and hours of practice. All such specifications are potential targets for antitrust attack — in the absence of clear antitrust rules — because they may reduce the income of one input provider or another, and several such providers have shown a propensity to threaten or bring antitrust lawsuits.

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<sup>2</sup> See *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998), cert. granted on other grounds, 67 U.S.L.W. 3187 (Sept. 29, 1998) (No. 98-84), and cert. denied, 67 U.S.L.W. 3234 (Oct. 5, 1998) (No. 98-107) (antitrust issue); *Hairston v. Pacific 10 Conference*, 101 F.3d 1315 (9th Cir. 1996); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir.), cert. denied, 508 U.S. 908 (1992); *Shelton v. NCAA*, 539 F.2d 1197 (9th Cir. 1976); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990); *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983); *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975); *Kupec v. Atlantic Coast Conference*, 399 F. Supp. 1377 (M.D.N.C. 1975).

In this brief, the NCAA suggests the proper scope of “quick look” analysis under the rule of reason. To assess the correct outcome of this case under the proper analysis would require thorough familiarity with the record before the Federal Trade Commission and the court of appeals. Lacking that familiarity, the NCAA submits this brief as *amicus curiae* in support of neither party. Because our position requires application of legal rules inconsistent with those applied by the Ninth Circuit below, however, we respectfully suggest that an appropriate disposition of this case would be to remand for review of the facts under the correct legal standards.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The second question presented in this case calls on the Court to clarify an important aspect of the rule of reason in antitrust law. Since this Court first applied an explicitly truncated rule-of-reason analysis in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), courts have struggled to formulate principles that would determine when to apply a full rule-of-reason analysis and when to afford a challenged practice only a “quick look” before condemning it.

There are two principal ways of regarding the “quick look.” Under one view, the “quick look” is no more than *per se* condemnation accompanied by a cursory and dismissive glance at possible justifications. But there is another conception of the “quick look,” which in our view is the correct one: If a challenged restraint does not come within the narrow categories receiving *per se* condemnation, full analysis of its anticompetitive effects may be postponed or pretermitted *only* if (a) the restraint is of a type that appears likely to raise prices or restrict output to consumers *and* (b) that likelihood is supported by evident market power or anticompetitive market effects. In such circumstances no full rule-of-reason analysis may be necessary *if* a “quick look” shows that the proffered procompetitive justifications for the restraint are implausible.

But a court should not jump ahead to a “quick look” at procompetitive justifications *unless* there is clear evidence that the restraint exploits the defendant’s market power in a relevant market or that the challenged practice actually has had market-wide anticompetitive effects. And full rule-of-reason analysis must supersede the “quick look” review if the defendant presents a plausible procompetitive justification for the restraint.

1. Before departing from a full rule-of-reason analysis of the competitive effects of a challenged practice, a court must have a compelling basis for concluding that the practice likely will produce anticompetitive effects within a properly defined market. If a restraint does not fall within the narrow categories subject to *per se* condemnation, an intuitive appraisal of the restraint cannot by itself justify assuming anticompetitive effects. Rather, a court must find a sufficient evidentiary basis for concluding that the restraint is likely to inflict the kind of market-wide harm to competition and consumers that is the concern of the antitrust laws. Only if that conclusion can be drawn without a full, detailed market analysis may a court proceed directly to consider the asserted procompetitive justifications.

To begin with, the challenged conduct must appear likely to raise prices or restrict output *to consumers*. But characterizing the type of conduct is not enough in itself to justify omitting a thorough analysis of anticompetitive effects. Rather, that analysis may be truncated in the first instance only if there is clear evidence that the defendant exercises market power in a properly defined market, or that the restraint *actually* has increased prices or restricted the output available to consumers throughout a market.

Without a strong showing of market power or anticompetitive effects, courts should not condemn business conduct after only a “quick look” at its justifications. To do so is effectively the same as *per se* condemnation of a practice. But this Court’s “quick look” cases have rejected arguments that the *per se* rule should be expanded, concluding that the challenged conduct had

sufficient potential for neutral or procompetitive effects to warrant at least some analysis under the rule of reason.

2. When a practice is subject to rule-of-reason analysis, it may be condemned after a “quick look” — and thus without full proof of anticompetitive effects — only if the practice is *not* reasonably ancillary to some larger procompetitive arrangement. If a defendant can state a facially plausible procompetitive justification for the challenged restraint, the “quick look” should be over and the restraint examined in full. A defendant should not have to produce factual support sufficient to *prevail* after a full rule-of-reason analysis before the plaintiff is put to *its* proof of actual anticompetitive effects. To rush to condemn a business practice in that way would make “quick look” analysis into a sham that clothes *per se* condemnation in rule-of-reason language.

Moreover, in considering whether the justifications for a restraint suffice to invoke a full rule-of-reason analysis, courts should not dismiss out of hand justifications that might not seem “procompetitive” in the narrowest sense — particularly when the defendant is a nonprofit organization or association. In concluding that judicial familiarity with certain restraints was not sufficient to support *per se* condemnation, this Court has relied on characteristics of particular defendants that did not directly relate to competition. In addition, a variety of consumer benefits may distinguish a joint product from competing products, and thus ultimately may affect the competitive implications of a restraint undertaken by a joint venture. That certainly is the case with the NCAA, see *Board of Regents*, 468 U.S. at 101-102, and may be the case with petitioner in this case as well.

## ARGUMENT

Most practices challenged under the antitrust laws “are analyzed under a ‘rule of reason’” that requires “the finder of fact” to “decide whether the questioned practice imposes an unreasonable restraint on competition.” *State Oil Co. v. Khan*, 118 S. Ct. 275, 279 (1997). Under normal rule-of-reason analysis, the plaintiff first must prove that the challenged practice has, or

likely will have, a substantial anticompetitive effect. That proof usually entails at least a showing that the defendant has market power and exercises it in a way that tends to restrain competition, or that the practice has actual anticompetitive effects in a properly defined market. See, e.g., *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611-13 (1953); see also, e.g., *Board of Regents*, 468 U.S. at 104-113. Upon such a showing, the factfinder weighs any procompetitive benefits of the practice against its demonstrated adverse effect on competition. See *Board of Regents*, 468 U.S. at 104.

Only a very few restraints, generally involving naked restraints on price or output, “have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*.” *State Oil*, 118 S. Ct. at 279. The *per se* rule applies “a conclusive presumption that the restraint is unreasonable.” *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982). Such a conclusion must be based on longstanding “experience with a particular kind of restraint” that “enables the Court to predict with confidence that the rule of reason will condemn it.” *State Oil*, 118 S. Ct. at 279 (quoting *Maricopa*, 457 U.S. at 344); see also *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990).

As judicial understanding of business economics has deepened, however, the set of practices condemned *per se* has shrunk rather than grown. This Court has recognized that practices formerly presumed to be anticompetitive in fact are neutral or even procompetitive in many cases. See *State Oil*, 118 S. Ct. at 279-285; see also Edward Correia, *Joint Ventures: Issues in Enforcement Policy*, 66 ANTITRUST L.J. 737, 753 n.70 (1998) (identifying other *per se* rules that have been narrowed in the past 25 years). See generally Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984). The Court has been particularly vigilant to correct overzealous efforts by lower courts to condemn *per se* horizontal arrangements that “restrain” trade in some sense but are undertaken as part of a joint venture that

permits efficient standardization or integration of productive efforts. *E.g., BMI v. CBS*, 441 U.S. 1, 17-24 (1979); *Board of Regents, supra*; *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 (1985).

In some cases, judicial experience with a restraint may not justify *per se* condemnation, yet the character of the restraint at issue may permit its condemnation after a truncated application of the rule of reason. See *Board of Regents*, 468 U.S. at 100-117; *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 457-464 (1986). Under this “quick look,” a defendant must advance plausible procompetitive justifications, or else the court may dispense with any *detailed* inquiry into market structure and actual anticompetitive effects. That variant of the rule of reason is at issue here.

#### **I. A RESTRAINT SUBJECT TO THE RULE OF REASON CANNOT BE CONDEMNED AFTER A “QUICK LOOK” WITHOUT A SHOWING OF MARKET POWER OR ANTICOMPETITIVE EFFECTS IN A RELEVANT MARKET**

1. Only limited types of business conduct may be subject to “quick look” review. Analysis under the rule of reason legitimately may proceed at a quicker pace when the conduct in question appears likely to raise prices or reduce output available to consumers. As the Sixth Circuit put it, the “quick look” generally is reserved for conduct that is “very similar to *per se* violations and might, but for prudential constraints, be analyzed under the *per se* presumption.” *Lie v. St. Joseph Hospital*, 964 F.2d 567, 569 (6th Cir. 1992); see also Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 717 (1998) (“quick look” may be applied only to “a practice [that] is much like one condemned as *per se* illegal even if it is not properly assigned to a *per se* category”).

This Court’s decisions in *Board of Regents* and *Indiana Dentists* provide prime examples of the type of conduct that qualifies for “quick look” review. In *Board of Regents*, colleges

pooled their sales of televised football games in a way that inevitably restricted nationwide output and, by setting a single price scale for that restricted output, effectively fixed prices as well.<sup>3</sup> The restraint in *Indiana Dentists* completely deprived consumers (acting through their fee-payment proxies, insurance companies) of X-rays, critical information about decisions about the adequacy and necessity of dental care. Constraining information, the Court recognized, is a type of output restriction.

The restraints at issue in this case resemble those in *Indiana Dentists*, but the differences may be significant. Petitioner here did not cut off *all* of a uniquely valuable source of information like X-rays. Rather, the advertising restrictions at issue here simply nibbled around the edges, and did not appear to cut patients and their insurers off from the information needed to compare prices among various dentists. It thus is not clear that a “quick look” analysis was appropriate at all.

2. Somewhat contradictory language in *Board of Regents* and *Indiana Dentists* has made it unclear whether a restraint can be condemned based on a “quick look” without any analysis of market power or anticompetitive effects. In *Board of Regents*, this Court observed that no “detailed market analysis” was necessary to show the anticompetitive effect of a seller’s “naked restraint on price and output.” 468 U.S. at 109-110. And the Court also stated that “a lengthy analysis of market power is not necessary” so long as “the anticompetitive effects of conduct can be ascertained though means short of extensive market analysis.” *Id.* at 110 n.42 (quoting U.S. Br., *Board of Regents*, at 19-20).

From these statements, some courts (though not the court below) have concluded that *no* market analysis is necessary in a

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<sup>3</sup> The NCAA accepts the judgment and reasoning of this Court in *Board of Regents* under principles of *stare decisis*, although the NCAA believes that the dissent in that case had considerable persuasive force.

"quick look" case. But, as Professor Areeda has explained, this Court's actual *decision* in *Board of Regents*

did not dispense in the *per se* manner with *all* proof of power or effects. \* \* \* It did not denigrate *any and all* proof of power and industry circumstances. Rather, it dispensed with "elaborate," "detailed," "extensive," and "lengthy analysis," of the industry, market, or power.

<sup>7</sup> PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1511, at 433 (1986) (emphasis added). A brief but *convincing* market analysis made a *detailed* one unnecessary.

In *Board of Regents*, however, the Court made clear that labeling conduct as probably anticompetitive is not enough to require the defendant to advance a procompetitive justification. Rather, this Court determined that the NCAA *did* "possess market power" in a properly defined "separate market for telecasts of college football." *Id.* at 111; see *Chicago Professional Sports Ltd. Partnership v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996) (Easterbrook, J.) (in *Board of Regents* "the Court satisfied itself that the NCAA possesses market power" before "cast[ing] any burden of justification on the NCAA"). And the Court did not rely on the finding of market power alone to infer the anticompetitive effects of the output limitation. Rather, the Court relied on the district court's factual findings, after a full trial, that the broadcast limitations actually reduced the number of broadcasts and increased the price paid for that limited output. *Board of Regents*, 468 U.S. at 111-114, 119-120.

Similarly, in *Indiana Dentists*, the Court did not substitute labels for market analysis. The Court again observed that the lack of an "elaborate" or "detailed market analysis" was "not fatal" under "quick look" review. *Indiana Dentists*, 476 U.S. at 460-461 (emphasis added). But the Court did not simply assume that the horizontal restriction on information output was inherently anticompetitive. Rather, as in *Board of Regents*, the Court identified evidence of both market power and anticompetitive effects. Before proceeding to assess the proffered procompetitive

justifications, the Court relied on specific FTC findings that "Federation dentists constituted heavy majorities of the practicing dentists" in two localities and that the challenged restraint actually reduced the output of X-rays provided for purchaser review. *Id.* at 460.

As the Court observed, "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition." 476 U.S. at 460. Accordingly, the Court reached the unremarkable conclusion that "'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.' 7 P. Areeda, Antitrust Law ¶1511, p. 429 (1986)." *Id.* at 460-461.

3. Recent assertions by antitrust enforcement agencies (and the ruling of one court of appeals) demonstrate the need for this Court to ensure that "quick look" analysis remains appropriately circumscribed. This Court has applied "quick look" analysis only in cases where there were showings of both market power and actual output restriction. In its brief in opposition to certiorari, the FTC recognizes that the decision below in fact relied on evidence of market power in order to justify condemning the challenged restraint after only a "quick look." And in the decision reviewed by the Ninth Circuit, the FTC held that petitioner "possesses the necessary market power to impose the costs of its anticompetitive restrictions on \* \* \* consumers." Pet. App. 84a.

The FTC did try to extend the *per se* rule in this case, however, and its brief in opposition hints that it may try to defend the result below by applying the more interventionist quick-look analysis that the Antitrust Division has recently advanced, and that the Tenth Circuit adopted in *Law v. NCAA*. The FTC asserts (Br. in Opp. 19-20) that the Ninth Circuit's analysis is "similar" to the "stepwise approach" endorsed by the Assistant Attorney General for the Antitrust Division. But that "stepwise approach" would permit business practices to be condemned, paradoxically, "without considering anticompetitive effects." Joel I. Klein,

Assistant Attorney General, Antitrust Division, A Stepwise Approach to Antitrust Review of Horizontal Agreements, Address to the ABA Section Semi-Annual Fall Program (Nov. 7, 1996) ("Stepwise Speech"), reprinted in [Current Comment] *Trade Reg. Rep.* (CCH) ¶ 50,157, at 49,194. That question-begging approach dispenses with *all* proof of market power or anticompetitive effects so long as a restraint has been characterized at the outset as warranting "quick look" analysis, and the defendant's proof of procompetitive benefits does not outweigh whatever value the factfinder assigns to *presumed* anticompetitive effects. See *ibid.*; accord Joel I. Klein, *A 'Stepwise' Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST, Spring 1998, at 41, 42.

Similarly, the Tenth Circuit has adopted an approach to "quick look" review that removes the calculus of anticompetitive effects from the rule of reason. The Tenth Circuit in *Law* condemned an NCAA bylaw without requiring *any* proof of market power or anticompetitive effects in a relevant market. See 134 F.3d at 1021-1024. As one commentator recently noted, under such a formulation, enforcement "agencies could demand proof of procompetitive justifications simply because agency staff do not understand the transaction." Correia, *supra*, 66 ANTITRUST L.J. at 753. And, as the NCAA is acutely aware, "[a]n even more troubling possibility is that private plaintiffs could shift the burden to the defendants without a showing of market power." *Ibid.* That is exactly what happened in *Law*.

In light of these developments, this Court should remove all doubt that the "quick look" should not be imprudently hasty: once conduct has been determined to require analysis under the rule of reason, that analysis may be reduced to a "quick look" only if the conduct has demonstrated anticompetitive effects or the restraint is shown to be an exercise of market power. The distinction between *per se* condemnation and analysis under the rule of reason makes little difference if characterization alone will carry a plaintiff's most difficult burden under the rule of reason: proving that business conduct hurts competition. This Court aptly

observed in *BMI*, 441 U.S. at 8, that "easy labels do not always supply ready answers." Attaching an epithet to conduct generally tells us little about anticompetitive effects, unless the conduct falls within the narrow (and shrinking) class of *per se* offenses.

Indeed, although "tying" and "group boycotts" remain classified as *per se* offenses, this Court requires proof of market power before tying or group boycotts may be condemned *per se*. See *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 26-27 (1984); *Northwest Stationers*, 472 U.S. at 296. The Court has insisted on a market-power screen because of the growing awareness that such conduct, while formerly condemned out of hand, can harm competition only in limited circumstances.<sup>4</sup> Surely "the issue of market power must be addressed directly" in the evaluation of conduct that can *not* be condemned *per se*. See Thomas Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 CAL. L. REV. 893, 914 (1987). If a business practice could be condemned after a "quick look" but without a showing of market power or actual anticompetitive effects, the practical result would be to extend the *per se* rule beyond its carefully limited boundaries.

A market power screen is particularly appropriate in the context of joint ventures, which generally involve a combined effort by entities that are horizontal competitors in some way. Lower courts have too readily attached erroneous "price-fixing" or "output restriction" labels to a variety of joint marketing, joint production, and standard-setting agreements. Without a market

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<sup>4</sup> Because "the point of antitrust is promoting consumer welfare," the antitrust laws should not condemn any business conduct "[i]f the structure of the market" allows "little potential for consumers to be harmed, \* \* \* because the presence of effective competition will provide a powerful antidote to any effort to exploit consumers." George Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807, 808 (1992). As Judge Easterbrook put it, entities without market power "cannot injure competition no matter how hard they try." Easterbrook, *supra*, 63 TEX. L. REV. at 20.

power screen, a wide variety of joint ventures could be condemned after a “quick look” even though they did not harm competition. Some market analysis (or showing of actual anti-competitive effects) is necessary at the threshold to “minimize the risk of enforcement mistakes” in this context. See *Correia, supra*, 66 ANTITRUST L.J. at 755.

4. In the decision below, the Ninth Circuit took a “quick look” at procompetitive justifications only after finding that petitioner possessed “enough market power to harm competition” (Pet. App. 24a). The Ninth Circuit based its conclusion on what it perceived as “significant barriers to entry” and a “high” — 75% — market share, under the assumption that the relevant market consisted of dentists in California or within localities in California (in some of which petitioner’s members accounted for 90% of all dentists). *Id.* at 23a.

On the surface, the Ninth Circuit’s analysis of market power might appear to coincide with this Court’s analysis (and its market definition) in *Indiana Dentists*. Petitioner, however, has raised serious questions about the significance the Ninth Circuit attributed to market share in determining market power in this case. This Court has cautioned against affording too much significance to market share in finding market power, emphasizing that “statistics concerning market share and concentration \* \* \* [are] not conclusive indicators of anticompetitive effects.” *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974). Rather, “[t]he relative effect of percentage command of a market varies with the setting in which that factor is placed.” *United States v. Columbia Steel Co.*, 334 U.S. 495, 527-528 (1948). “Market share alone is misleading.” William Landes & Richard Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 947 (1981).

The Ninth Circuit appears to have paid little heed to those cautions. As petitioner has pointed out, 25% of California dentists were *not* covered by petitioner’s rules, and thus could advertise and exert downward competitive pressure on the prices charged by petitioner’s members. See, e.g., Pet. 24-25; see also

Pet. App. 110a (Azcuena, Comm’r, dissenting) (characterizing evidence of market power as “sparse”). In light of the type of restraint at issue in this case, the Ninth Circuit’s analysis of market power was too cursory.

The court of appeals also found a restriction of output based on the FTC’s showing that some truthful advertising had been curtailed as a result of the challenged restraint. Although precedent and commentary support casting a skeptical eye on *blanket* advertising bans,<sup>5</sup> petitioner’s restrictions were not so broad. And unlike the X-rays at issue in *Indiana Dentists*, which contained information that purchasers could not obtain in any other way, the price and quality information at issue here was available from other sources — including the word-of-mouth communications among consumers that are the bedrock of most successful professional practices.

Whether or not it was ultimately accurate, the Ninth Circuit’s consideration of market facts was excessively sparse and reflected a far more cursory analysis than those in *Board of Regents* and *Indiana Dentists*. The Ninth Circuit’s haste to condemn the challenged advertising restrictions led to similar analytical shortcomings in its peremptory rejection of the justifications that petitioner offered.

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<sup>5</sup> Professor Areeda predicted that, “[i]f large scale professional organizations like the American Medical Association promulgate rules against advertising, a court will see a significant restraint that needs to be analyzed without careful market definition.” 7 AREEDA, *supra*, ¶ 1503, at 377, quoted in Pet. App. 24a. And this Court has held that *blanket* restrictions on price advertising “will tend to mitigate competition and maintain prices at a higher level than [otherwise] would prevail.” 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996).

## II. THE “QUICK LOOK” MUST GIVE WAY TO FULL RULE-OF-REASON ANALYSIS ONCE A DEFENDANT HAS OFFERED A FACIALLY PLAUSIBLE PROCOMPETITIVE JUSTIFICATION

1. In *Board of Regents*, this Court held that under the “quick look” rule of reason the NCAA need only provide “some competitive justification” for a challenged restraint. 468 U.S. at 110. The Court stopped short of full rule-of-reason analysis only because the output limitation at issue in *Board of Regents* was “not even arguably tailored” to the asserted procompetitive interests. *Id.* at 119. Similarly, in *Indiana Dentists*, this Court explained that a “quick look” under the rule of reason must expand into a full rule-of-reason analysis if the defendant identified “some countervailing procompetitive virtue” or “some competitive justification” for a challenged restraint. 476 U.S. at 459-460 (quoting *Board of Regents*). The only reason why the Court did not undertake a full rule-of-reason analysis was that “[n]o credible argument has been advanced” that the restraint served procompetitive interests. *Id.* at 459 (emphasis added).

Thus, a defendant can terminate the “quick look” and return to the full rule of reason by advancing a plausible procompetitive justification for the challenged restraint. A defendant may “avoid summary condemnation if [it] claims justification of the kind which a ‘quick look’ — *usually at the arguments alone* — shows to be legitimate in principle and capable of being proved satisfactorily.” 7 AREEDA, *supra*, ¶ 1511, at 428-429 (emphasis added). That modest showing by the defendant triggers full rule-of-reason scrutiny and thereby shifts to the plaintiff the burden to demonstrate market power or anticompetitive effects in a market. *Id.* at 429.<sup>6</sup>

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<sup>6</sup> The defendant’s burden under “quick look” review is similar to that of a defendant in the initial stages of the burden-shifting framework used in employment discrimination cases. See Mark Chang, David Evans & Richard Schmalensee, *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*,

Only after such a showing by the plaintiff does a defendant “have the burden of coming forward” with “evidence that the justifications claimed are legitimate in principle and are actually promoted significantly by the restraint.” 7 AREEDA, *supra*, ¶ 1511, at 429; see also Schmalensee, *Agreements Between Competitors*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 98, 110-111 (T. Jorde *et al.*, eds., 1992); William Kolasky, *Counterpoint: The Department of Justice’s ‘Stepwise’ Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements*, ANTITRUST, Spring 1998, at 41, 45 (under the quick-look approach, a defendant must “come forward” with a “plausible” or “legitimate” reason for the restraint). As the Third Circuit has explained, defendants need not produce a “persuasive procompetitive justification, or a showing of *necessity*,” simply to return antitrust analysis of their activities to its presumptive starting point: full rule-of-reason review. *United States v. Brown University*, 5 F.3d 658, 676 (1993) (emphasis added). Judge Posner, writing for the Seventh Circuit, saw it the same way: a defendant causes the analysis to revert to the full rule of reason merely by asserting “a plausible connection between the specific restriction and the essential character of the product.” *General Leaseways v. National Truck Leasing Ass’n*, 744 F.2d 588, 595 (7th Cir. 1984).

In the decision below, however, the Ninth Circuit held that the assertion of an admittedly “legitimate” and “indeed procompetitive goal” of “preventing false and misleading” advertising was insufficient for the defendant to meet its burden under “quick look” review. Pet. App. 19a. The Ninth Circuit instead required petitioner to prove that the restraint had “in fact” achieved the asserted procompetitive end. Pet. App. 20a. The Tenth Circuit in *Law* followed the same approach. See 134 F.3d at 1021-1024.

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1998 COLUM. BUS. L. REV. 223, 280 & n.116. Once the plaintiff has established a *prima facie* case that the challenged restraint at issue may have an anticompetitive effect, the defendant need only articulate a legitimate justification for the restraint in order to shift the burden of proving anticompetitive effects back to the plaintiff.

The Antitrust Division appears to side with the Ninth and Tenth Circuits. The “stepwise approach” now favored by the Antitrust Division also would permit a summary finding of liability unless the defendant proves “with real world evidence — factual evidence, expert economic evidence, or preferably both” — that the restraint *actually* serves a procompetitive purpose. Klein, *Stepwise Speech, supra*, at 49,192.

This is too much. Requiring defendants to prove the benefits of their conduct *before* plaintiffs show that the conduct actually harms competition stands the procompetitive principles of the antitrust laws on their head. This burden-shifting standard presents a particularly acute risk of deterring innovative, pro-consumer collaboration. See Easterbrook, *supra*, 63 TEX. L. REV. at 5 (“The inhospitality tradition of antitrust has proven very costly. The costs were inevitable. Wisdom lags far behind the market.”). That is especially so in joint-venture and standard-setting contexts, in light of “the enormous difficulties that can be associated with *proving* valid efficiencies.” Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission’s Antitrust Analysis*, 64 ANTITRUST L.J. 613, 615 (1996) (emphasis added).

Indeed, the procompetitive efficiencies of many business practices are often “difficult to quantify” without close economic examination. Mark Chang, David Evans & Richard Schmalensee, *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, 1998 COLUM. BUS. L. REV. 223, 309. For that reason, economists have criticized the heavy burden placed on defendants by versions of the “quick look” that prematurely shift burdens of proof, and thus may “condemn conduct that may or may not have been efficient but had not been shown to have anticompetitive effects, solely because the respondent had failed to overcome the complex problems (or cost) of proving that the

conduct was positively procompetitive.” Kattan, *supra*, at 615; see also Chang *et al.*, *supra*, at 309.<sup>7</sup>

It is difficult to quantify many procompetitive benefits. For example, there is no reliable way to measure the intensification of intercollegiate athletic competition resulting from rules that equalize the coaching resources that schools can use for their teams, as in *Law*. Nor can one measure the consumer benefits of channeling professional advertising away from the sort of claims that may risk misleading or disappointing consumers, as in this case. Such claimed benefits invite judicial skepticism and demands for “better” — and often unavailable — proof. To avoid erroneously condemning a broad range of benign or beneficial activity — and to avoid making “quick look” analysis the instrument of a greatly expanded *per se* rule, see Kolasky, *supra*, at 43 — the assertion of a logically plausible justification for a challenged restraint should be enough to invoke full rule-of-reason analysis. The plaintiff then should be put to its burden of proving actual anticompetitive effects.

2. Justifications for a challenged restriction raise another question under rule-of-reason analysis generally and quick-look analysis in particular. That is whether the rule of reason may take

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<sup>7</sup> Federal antitrust enforcement agencies are well aware that efficiencies, even if genuine and important, are often hard to prove, and that legal rules that require proving efficiency may result in overdeterrence of socially beneficial activity. In replacing the 1968 Merger Guidelines, which overdetected beneficial mergers, with the more lenient 1982 Guidelines, for example, the agencies were motivated in large measure by recognition that a case-by-case approach to evaluating merger-caused efficiencies would likely “creat[e] an administrative and judicial morass” and involve “extensive, perhaps fruitless, efforts to assess potential efficiency gains in individual cases.” John J. McGowan, *Mergers for Power or Progress?*, in ANTITRUST AND REGULATION 1, 10, 11 (F. Fisher ed. 1985) (Professor McGowan’s essay reflects the views of a task force that advised the government on redrafting the Merger Guidelines).

account of social benefits that are not directly related to competition, or are not ordinarily expressed in economic terms.

Some courts, including the Tenth Circuit in *Law*, see 134 F.3d at 1021-1022, refuse to consider *any* justifications for challenged restraints unless the asserted benefits fit directly within a particular court's paradigm of commercial competition. Other courts take a much broader view of the considerations relevant to the rule-of-reason inquiry.<sup>8</sup> Some of those courts explicitly recognize non-commercial justifications as proper. Others recast apparently "social" justifications in economic terms.

In reviewing the reasoning of the Ninth Circuit in the present case, the Court should explicitly approve that court's conclusion that justifications based on fostering professionalism may have procompetitive aspects, and thus warrant consideration under the

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<sup>8</sup> See, e.g., *Board of Regents*, 468 U.S. at 117; *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) (acknowledging that the non-commercial justification of promoting amateurism in intercollegiate athletics warranted consideration in a rule-of-reason analysis); *Brown University*, 5 F.3d at 677-678 (holding that socio-economic diversity on campus and high-quality education are cognizable justifications under the rule of reason); *Hertz Corp. v. City of New York*, 1 F.3d 121, 131 (2d Cir. 1993) (holding that a municipality's role in barring certain rental car surcharges warranted consideration of "non-commercial federal values embodied in the thirteenth and fourteenth amendments" in the "economic scale of traditional antitrust analysis"), cert. denied, 510 U.S. 1111 (1994); *Cha-Car, Inc. v. Calder Race Course, Inc.*, 752 F.2d 609, 614 n.9 (11th Cir. 1985) (stating that rules by cooperative groups such as trade associations and sports organizations may be justified under the rule of reason based on non-commercial objectives that are, e.g., "essential to the existence of or survival of a sport"); *Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 584 n.8 (D.C. Cir. 1984) (recognizing that certain non-commercial justifications which "are essential to the [nonprofit] organization's achieving its legitimate noncommercial objectives" are cognizable under traditional antitrust analysis).

rule of reason. See Pet. App. 19a-20a. The Ninth Circuit went astray when — in a "quick look" case — it rejected as *unproven* petitioner's plausible assertion that the conduct promoted the asserted ends, but at least it recognized the legitimacy of ends that were not purely linked to commercial competition. This Court should make clear that the antitrust laws do not categorically forbid consideration of such factors to justify a limited restraint on some aspect of competition.

Petitioner in this case is a nonprofit standard-setting organization of professionals; its advertising restrictions are motivated at least in part by concerns over quality, professional stature, and consumer trust. See generally Michael Goldenberg, *Standards, Public Welfare Defenses, and the Antitrust Laws*, 42 BUS. L.W. 629, 642-653 (1987). As this Court has recognized, e.g., *Board of Regents*, 468 U.S. at 101-102, 120, many of the valuable functions of the NCAA also have little to do with unfettered economic competition; indeed, the NCAA's amateur sports "product" is differentiated by, and thus is marketable because, it is *less* characterized by pure economic competition between teams than major professional sports. *Ibid.*

This Court's decisions give somewhat conflicting signals about the validity of justifications that are not strictly related to promoting competition. In a widely repeated statement, the Court wrote that the rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint," but rather "focuses directly on the challenged restraint's impact on competitive conditions." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978). And the Court rejected the defendant professional association's public interest justification for its ban on all competitive bidding by saying that "the inquiry mandated by the Rule of Reason is [limited to evaluating] whether the challenged agreement is one that promotes competition or one that suppresses competition." *Id.* at 691. But that statement must be viewed in context: the Court was laying a foundation for its rejection of the proposition that non-commercial concerns could justify a horizontal restraint that

flatly precluded *all* price competition for sales of the final *output* of the defendant association's members. *Id.* at 695-696.

The Court later made clear in *Board of Regents*, however, that it did not mean to foreclose *all* consideration of benefits that do not directly promote competition. The Court's analysis under the rule of reason weighed the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports" and in "the preservation of the student-athlete in higher education." 468 U.S. at 120. By depriving schools of the ability to compete for athletes by paying them, amateurism in some sense may restrict the scope of competition, but it fosters other values. The Court also recognized that benefits that do not *directly* promote competition in fact may stimulate competition indirectly, whether by increasing consumer confidence in a profession and its services, or by further differentiating a joint product from competing products by "preserv[ing] [its] character and quality." *Id.* at 102. As this Court recognized, such conduct "can be viewed as procompetitive" under a rule-of-reason analysis. *Ibid.*

There is no basis for turning a blind eye toward considerations of public benefits not directly tied to competition in the marketplace. That is especially so when the defendant is a nonprofit entity, and still more when both the defendant and its members are nonprofit institutions, as is the case with the NCAA. "[N]either *Professional Engineers* nor any other decision of this Court suggests that \* \* \* nonprofit [organizations] must defend their self-regulatory restraints solely in terms of their competitive impact, without regard for the legitimate non-commercial values they promote." *Board of Regents*, 468 U.S. at 135 (White, J., dissenting); see also 7 AREEDA, *supra*, ¶ 1504, at 380-383. Excluding all consideration of non-commercial values would be inconsistent with the Court's pronouncement that it is "unrealistic to view the practice of professions as interchangeable with other business activities, and automatically [to] apply to the professions antitrust concepts which originated in other areas," *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975), a view to

which the Court expressly "adhere[d]" in *Professional Engineers*, 435 U.S. at 696.

This Court certainly has not foreclosed the possibility that some practices by nonprofit organizations may be justified under the rule of reason when they are important to achievement of the organization's legitimate noncommercial objectives. See, e.g., *Professional Engineers*, 435 U.S. at 696 & n.22; *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 n.23 (1977). To the contrary, the Court has recognized the importance to antitrust analysis of the "public service aspect" of some challenged restraints. *Maricopa*, 457 U.S. at 348 (quoting *Goldfarb*, 421 U.S. at 788 n.17). An assessment of the activities of nonprofit organizations "may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Id.* at 348-349 (quoting *Goldfarb*, 421 U.S. at 788 n.17).

The Sherman Act declares competition to be the overarching and vitally important national economic policy, but Congress did not intend the Sherman Act to require *all* concerted human activity to justify itself solely in terms of allocative efficiency. "Not every aspect of life in the United States is to be reduced to such a single-minded vision of the ubiquity of commerce." *Dedication and Everlasting Love to Animals v. Humane Society*, 50 F.3d 710, 714 (9th Cir. 1995).

Regulations such as those challenged in *Board of Regents* do not arise in a purely commercial context. Special consideration must be accorded to the necessarily and properly integrated nature of various noncommercial and educational activities at issue in those settings. As Justice White observed, "the Sherman Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." *Board of Regents*, 468 U.S. at 133 (dissenting opinion) (quoting *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959)).

The core vice of excluding noneconomic "public interest" considerations from the rule-of-reason balance is the same as the core vice of overzealously invoking the "quick look": it makes a court's job seem too easy and allows a court to condemn conduct that is socially beneficial without adequately evaluating the real-world effects of its decision. Professor Areeda's treatise and the *Law* case illustrate that vice.

Professor Areeda hypothesizes an agreement among television networks "that each would devote two hours weekly, not overlapping with the others, to quality programming." 7 AREEDA, *supra*, ¶ 1504, at 383. Professor Areeda makes clear that such an agreement should be sustained under a rule-of-reason inquiry even though it "may seem an illegitimate appeal to those broader claims of 'public interest' that *Engineers* rejected." *Ibid.* Without directly challenging the *Engineers* dictum, however, Professor Areeda then imaginatively recasts the restraint as one that "offset[s] a 'market failure'" and thereby "promotes competitive results." *Ibid.*

But district courts and courts of appeals do not generally accept such recharacterizations — especially when they are advanced by self-interested litigants and not by an eminent law professor discussing hypothetical facts. Instead, the response of the *Law* court is unfortunately typical. That court reflexively dismissed the NCAA's demonstration that unbridled economic competition by universities for coaching talent had led to market failures that impaired equity among colleges and injured younger coaches: "While opening up coaching positions for younger people may have social value apart from its effect on competition, we may not consider such values unless they impact upon competition." *Law*, 134 F.3d at 1021-1022.

When nonprofit organizations pursue socially beneficial goals in a reasonable manner, they should not be mulcted with treble damages just because a court excludes from consideration the legitimate goals being pursued. Congress could not possibly have intended the antitrust laws to penalize nonprofit organizations for pursuing non-commercial goals. The antitrust laws, and partic-

ularly the rule of *reason*, were never meant to require courts to wear blinders and thereby condemn socially beneficial conduct.

This Court should dispel the confusion created by out-of-context quotations from *Professional Engineers* and explicitly hold that non-commercial justifications may be considered in a rule-of-reason analysis. Recognizing the legitimacy of such justifications is particularly important when the defendant is a non-profit regulatory association whose justifications for standards and other restraints often must rest on non-commercial and social welfare concerns. Such considerations will not *prevail* where the restraint is too broad, as in *Professional Engineers*. But categorical exclusion of non-commercial concerns exposes nonprofit regulatory associations to inappropriate risks of antitrust litigation and liability.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE  
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OCTOBER TERM, 1997

CALIFORNIA DENTAL ASSOCIATION,  
*Petitioner,*

v.

FEDERAL TRADE COMMISSION,  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

**BRIEF OF THE AMERICAN DENTAL ASSOCIATION,  
AMERICAN MEDICAL ASSOCIATION, AMERICAN  
PSYCHIATRIC ASSOCIATION, NATIONAL SOCIETY OF  
PROFESSIONAL ENGINEERS, NATIONAL ASSOCIATION  
OF SOCIAL WORKERS, AND NATIONAL ASSOCIATION  
OF REALTORS® AS *AMICI CURIAE* IN SUPPORT OF  
PETITIONERS**

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## INTEREST OF *AMICI*<sup>1</sup>

The American Dental Association ("ADA") is the oldest and largest national association of dentists in the United States. It is dedicated to furthering the education and training of dentists so that they may fulfill their "overriding obligation . . . to provide quality care in a competent and timely manner." See ADA, PRINCIPLES OF ETHICS AND CODE OF PROF'L CONDUCT 1 (1995). Through the ADA, members of the profession also carry out the "privilege and obligation of self-government," *id.*, including the promulgation of ethical guidelines. These guidelines address, *inter alia*, ethical issues in advertising by dentists.

The American Medical Association ("AMA"), the largest association of physicians in the United States, was founded in 1846 to advance medical science and education and to upgrade the health of the American people. It sponsors a vast array of educational, scientific, and public health programs. The AMA has adopted a document, known as THE PRINCIPLES OF MEDICAL ETHICS, that consists of basic rules for the ethical practice of medicine. Its Council on Ethical and Judicial Affairs promulgates statements that apply the Principles to numerous issues confronting physicians, e.g., responsibilities to patients at the end of life. These statements include guidelines on ethical promotional practices by physicians.

The American Psychiatric Association ("APA") is the nation's leading organization of physicians specializing in psychiatry. It engages in a wide variety of educational, scientific, and public health activities. The APA promulgates and applies ethical

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<sup>1</sup> Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and the consent letters have been filed with the Clerk of the Court.

standards for its members based on AMA standards. PRINCIPLES OF MEDICAL ETHICS: WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY.

The National Society of Professional Engineers ("NSPE") is an individual professional membership association of over 60,000 licensed engineers practicing in government, industry, education, construction and private practice. Its mission is to promote the ethical, competent and licensed practice of engineering. Through its many programs, NSPE helps establish educational and licensure standards for the protection of the public health and safety. Its CODE OF ETHICS FOR ENGINEERS encourages all engineers to practice consistently with those standards.

The National Association of Social Workers ("NASW") is a professional membership organization comprised of more than 155,000 social workers. The NASW seeks to encourage high standards of practice by social workers. In furtherance of this purpose, the NASW publishes STANDARDS FOR THE PRACTICE OF CLINICAL SOCIAL WORK and GUIDELINES FOR CLINICAL SOCIAL WORK SUPERVISION. It also disseminates the NASW CODE OF ETHICS to provide guidance to social workers on ethical issues that they may face.

The National Association of Realtors® ("NAR") is a non-profit association comprised of approximately 700,000 individuals involved in all aspects of the real estate profession, including brokerage, management, appraisal, and counseling. The NAR has issued a CODE OF ETHICS AND STANDARD OF PRACTICE to guide its members. The Code is intended to promote competence, fairness, and high integrity among Realtors®. Among the issues that it addresses are advertising and representations by NAR members to the public.

*Amici* are all nonprofit, professional associations. They are comprised of individuals who seek to apply a complex body of knowledge in meeting the needs of their patients or clients in an ethical manner. They have a long-standing tradition of responsible self-regulation in furtherance of the shared commitment of their members both to the patient or client and to the public. For these reasons, *amici*, like many other professional associations, promulgate codes of ethics and ethical guidelines.

This case involves a decision which subjects the California Dental Association ("CDA"), a voluntary, nonprofit association of dentists, to the jurisdiction of the Federal Trade Commission ("FTC") and which condemns ethical positions that were intended to help assure that advertising by members of the CDA is not "false, deceptive, or misleading." See *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977). The Court has granted certiorari to determine whether Congress has given the FTC authority to regulate the CDA and, if so, whether the ethical guidelines of the Association can be found to violate the antitrust laws without a thorough analysis of their competitive significance. *Amici* have a direct interest in both issues.<sup>2</sup>

First, a decision that Congress has conferred upon the FTC jurisdiction over the CDA would subject *amici* and other professional associations to lengthy and expensive litigation brought by an agency which was not intended to have, and (as this case demonstrates) does not have, the broad perspective and expertise necessary to harmonize the public interest in legitimate professional self-regulation with the requirements of the antitrust laws. Every time that a professional association is

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<sup>2</sup> The Court previously granted certiorari to resolve the conflict on the first issue, but divided equally. See *American Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982). Thus, the question remains unresolved.

subjected to an FTC investigation, its limited resources are diverted from the nonprofit activities for which they were intended. Significantly, moreover, there is absolutely no need to expose professional associations to these costs. Such associations are unquestionably subject to antitrust actions in federal court brought under the Sherman Act by the Department of Justice, State Attorneys General, and private parties.

Second, a decision upholding the invalidation of the ethical positions of the CDA on advertising by members, on the basis of the quick look given by the court below or the faulty analysis applied by the FTC, would expose the ethical guidelines of *amici* to antitrust condemnation whenever a government agency or private plaintiff saw fit to challenge them. In so doing, it would undermine the public interest in avoiding the evils, e.g., deception of consumers, that responsible professional self-regulation is intended to avert. Nearly a quarter of a century ago, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n. 17 (1975), this Court observed that the "public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." The antitrust consequences of the ethical guidelines of the CDA should be evaluated in a manner that takes into account "the public service aspect," and "other features of the professions." Unless they are, the antitrust laws, which are supposed to be a prescription for consumer welfare, see *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), will, paradoxically, have produced the exact opposite result.

*Amici* offer this Brief in hopes that their insights into the legal issues raised by, and the practical consequences of, the decisions below may assist this Court.

## STATEMENT OF THE CASE

1. The guidelines of the CDA at issue in this case prohibit "false or misleading" statements in advertising by dentists. More specifically, section 10 of the CDA's Code of Ethics provides:

Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training or competence in any way that would be false or misleading in any material respect.

See Appendix to Petition for Certiorari 190a ("Pet. App.") The CDA has issued Advisory Opinions which provide greater detail about the ethical standards applicable to dental advertising. For example, its Advisory Opinions denounce as inherently misleading the use of certain words to describe the cost of dental services, including "as low as," "and up," and "lowest prices." See *id.* at 202a-04a. According to the CDA, price advertisements that refer to the cost of dental services and use words of comparison, such as "low fees," should be based on verifiable data substantiating the comparison. *Id.* at 200a. In addition, the CDA has issued advice that discourages quality claims because such claims "are not susceptible to measurement or verification." *Id.* at 202a-04a, 216a-18a. Finally, the CDA has issued Advertising Guidelines that permit advertising of "discounts on regular fees," but that require certain clarifying disclosures in the advertisements. These include the dollar amount of the nondiscounted fee, the dollar amount or

percentage of the discount, and the length of time that the discount will be offered. *Id.*

Significantly, the maximum sanction that can be imposed by the CDA for violation of its ethical statements is exclusion from membership. Although a majority of dentists in California belong to the CDA, a significant minority does not. Membership in the CDA is not necessary to practice dentistry in California, and there is no evidence in the record that dentists who choose not to join the Association are at a significant competitive disadvantage. *Id.* 144a.

2. The FTC's complaint alleged that the CDA's ethical guidelines unreasonably restrain competition in violation of section 1 of the Sherman Act and section 5 of the FTC Act. The CDA defended on two grounds: First, it argued that the FTC lacks jurisdiction because the CDA is a nonprofit, professional association which is not "organized to carry on business for its own profit or that of its members" within the meaning of section 4 of the FTC Act. 15 U.S.C. § 44. Second, the CDA asserted that its ethical pronouncements constitute legitimate, self-regulatory activity that serves the public interest and that does not suppress competition.

The Administrative Law Judge ("ALJ") disagreed. He first held that the FTC had jurisdiction because a number of the CDA's activities provide a pecuniary benefit to members. Pet. App. 253a. Despite finding that the ethical guidelines of the CDA have "no impact on competition in any market in the State of California," *id.* at 246a, he determined that these guidelines constitute an unreasonable restraint of trade because they are inherently suspect and lack a plausible procompetitive justification.

The FTC affirmed the ALJ's decision -- but on grounds somewhat different than those relied on by the ALJ. The

Commission held that the CDA's restrictions on price advertising are unlawful per se, that the nonprice advertising guidelines could be declared unlawful under the abbreviated (or "quick-look") rule of reason analysis, and that, in any event, the CDA has market power sufficient to support a finding of anticompetitive effect. One member of the FTC concurred in the result reached in the majority opinion, but relied on the grounds stated by the ALJ. Commissioner Azcuenaga dissented, explaining that the CDA does not have market power and that the CDA has not engaged in anticompetitive conduct.

3. The Court of Appeals affirmed the decision of the FTC to condemn the ethical guidelines of the CDA. The Court held that an association that "provides tangible pecuniary benefits to members" is subject to FTC jurisdiction -- despite the Act's express restriction of FTC jurisdiction to associations "organized to carry on business for [their] own profit or that of [their] members." *California Dental Ass'n. v. FTC*, 128 F.3d 720, 725-26 (9th Cir. 1997). The Court also affirmed the FTC's decision that the CDA's ethical guidelines unreasonably restrain trade. It "disagree[d] with [the FTC's] use of per se analysis but sustain[ed] its alternative conclusion that an abbreviated rule of reason analysis applies." *Id.* at 726-27. The Court concluded that the restrictions that the CDA places on price and non-price advertising are sufficiently "naked" to justify application of the quick-look rule of reason. It held that the CDA has sufficient market power to harm competition through issuance of guidelines and that the guidelines at issue restrict competition. *Id.* at 728.

Judge Real dissented from both holdings. He explained that the FTC does not have jurisdiction because the CDA "does not operate commercially." *Id.* at 730. Assuming arguendo that the FTC has jurisdiction, Judge Real would have ruled that the quick-look analysis cannot be applied in this case: "[T]he rules of the CDA . . . are not per se a restraint on competition in the

dental profession nor are they sufficiently anti-competitive on their face to eschew a full-blown rule of reason inquiry." *Id.* at 731. In his view, all that the CDA was doing was "attempting to guard against misleading or unreliable advertising by its members." *Id.*

## SUMMARY OF ARGUMENT

1. In stark contrast to the sweeping language of the contemporaneously enacted Clayton Act, the FTC Act expressly limits FTC jurisdiction to corporations "organized to carry on business for [their] own profit or that of [their] members." 15 U.S.C. § 44. Nothing in the language or legislative history of the FTC Act indicates that Congress intended to give the Commission jurisdiction over nonprofit, professional societies. On the contrary, Congress envisioned the FTC as a specialized agency that would develop expertise in the application of antitrust and other trade regulation law to industrial and commercial businesses operating in the for-profit sector of the economy. It vested antitrust authority over nonprofit associations of professionals exclusively in the federal courts enforcing the Sherman Act. Part I.A.

The CDA is not "organized to carry on business for its own profit or that of its members" within the meaning of § 4 of the FTC Act. 15 U.S.C. § 44. It is organized as a nonprofit corporation under state law. It is recognized by the Internal Revenue Service as a corporation "not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual" under section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. § 501(c)(6). It is not intended to produce financial gain to be distributed to members in the form of dividends or any other manner. That the CDA "provides tangible, pecuniary benefits to its members," 128 F.3d at 726, is entirely irrelevant to the proper statutory inquiry. Rather, as the Eighth Circuit correctly recognized in *Community*

*Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1019-20 (8th Cir. 1969), an association is not organized to carry on business for the profit of its members because its activities confer some economic benefit upon them. Part I.B.

To be sure, this Court has upheld FTC orders against organizations of professionals. See, e.g., *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). In those cases, however, the jurisdictional issue was never raised or decided. Moreover, comparison of the purposes of the CDA with those of the organizations involved in previous decisions of this Court underscores why the FTC lacks jurisdiction over the CDA. Part I.C.

2. Abbreviated rule of reason analysis may not properly be applied to canons of professional ethics which have, at a minimum, plausible procompetitive purposes and effects. The "quick-look" approach is confined to the exceptional circumstance in "which no elaborate industry analysis is required to demonstrate the anticompetitive character" of an inherently suspect restraint of trade. See *NCAA v. Board of Regents*, 468 U.S. 85, 109 (1984) (citation omitted). Here, by contrast, the fact that the ethical positions of the CDA arise in the professions and serve to assure the provision of non-deceptive information to potential patients requires a thorough scrutiny of the competitive significance of these positions. Part II.A.

Proper application of the rule of reason demonstrates that ethical positions which encourage disclosures to prevent deception in price advertising by dentists and which characterize certain non-verifiable claims of quality as deceptive promote competition and therefore satisfy antitrust requirements. Indeed, this Court has noted, albeit in the First Amendment context, that ethical rules governing professional advertising that require additional disclosures (instead of prohibiting

speech) and that ban unverifiable claims serve procompetitive purposes. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Bates*, 433 U.S. at 383-84. Finally, ethical rules that prevent inaccurate advertisements are procompetitive because they make professional services more attractive to a public increasingly cynical about professional claims and conduct. Cf. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). Part II.B.

The FTC's wrongful assertion of authority over the CDA resulted in its misguided condemnation of the ethical positions at issue. The decisions below chill numerous legitimate self-regulatory activities by nonprofit professional associations that serve the public interest. For all these reasons, the Court should reverse the decision below. Part II.C.

## ARGUMENT

### I. THE FTC LACKS JURISDICTION OVER NONPROFIT, PROFESSIONAL ASSOCIATIONS.

A. The starting point in determining the scope of the FTC's jurisdiction is the language of the FTC Act. See *Reiter*, 442 U.S. at 337. Unlike the Sherman Act, the FTC Act does not apply to all entities. Rather, section 5(a)(2) of the Act, 15 U.S.C. § 45(a)(2), explicitly limits the FTC's jurisdiction to "persons, partnerships, [and] corporations." Section 4 of the Act, 15 U.S.C. § 44, in turn, carefully defines the "corporations" that are subject to the Act. Specifically, an association is a "corporation" subject to FTC jurisdiction only

if it is "organized to carry on business for its own profit or that of its members."<sup>3</sup>

The language of sections 4 and 5 of the FTC Act reflects Congress' intention to make the FTC an agency of limited jurisdiction. In particular, the agency's jurisdiction is limited to for-profit, commercial entities and to associations that are organized to produce profit for such entities. The congressional intention on this point is best evinced by contrasting the FTC Act's jurisdictional provisions with those in the contemporaneously enacted Clayton Act.

Specifically, the same Congress that limited the FTC's jurisdiction to corporations "organized to carry on business for . . . profit" expressly made the Clayton Act (like the Sherman Act before it) applicable to *all* associations.<sup>4</sup> See *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 277 (1975) (Clayton and FTC Acts to be construed together). This juxtaposition is most telling. By limiting FTC jurisdiction to corporations organized for profit while making all associations subject to the Sherman and Clayton Acts, Congress manifested

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<sup>3</sup> Section 4, enacted in 1914, provides:

"Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members. 38 Stat. 717, 719.

<sup>4</sup> The Clayton Act (15 U.S.C. §§ 12-27), like the Sherman Act (15 U.S.C. §§ 1-7), applies to all "persons." Both statutes define "persons" to "include" all "associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." See 15 U.S.C. §§ 7, 12.

its intent to exclude nonprofit, professional associations from FTC jurisdiction while giving the federal courts that enforce the Sherman Act exclusive antitrust jurisdiction over such associations.

The legislative history of the FTC Act reinforces the conclusions that flow from its language and from a comparison of that language to the Clayton Act. The entire thrust of the Act's history is that the Commission was created to develop expertise concerning industrial, commercial, and other trade entities and thus be better able to apply national antitrust policy to such entities than would a court.<sup>5</sup> No representatives of professional or nonprofit associations were invited to testify about the FTC Act. Nothing in the Act's language or history in any way suggests a congressional concern with the activities of nonprofit, professional associations. Cf. *United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 336 (1952) (market for medical and professional services presents issues "quite different than the usual considerations prevailing in ordinary commercial matters"). Indeed, when Congress created the FTC as an agency of limited jurisdiction over corporations "organized to carry on business for . . . profit," the professions and their associations were not even thought to be subject to the antitrust laws. See *Feminist Women's Health Ctr., Inc. v. Mohammad*, 586 F.2d 530, 552-553 (5th Cir. 1978) (Wisdom, J.) (professions not regarded in 1915 as subject to the antitrust laws). See also *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 436 (1932).

Significantly, in 1977, when the FTC sought legislation to expand its jurisdiction to include nonprofit associations

<sup>5</sup> See, e.g., H.R. Rep. No. 63-1142, at 11, 14, 18-19 (1914) (the FTC will be "an administrative body of practical men thoroughly informed in regard to business"); S. Rep. No. 63-597, at 8-9, 11, 28 (1914). See also *Community Blood Bank* 405 F.2d at 1017-18 (describing legislative history).

(including nonprofit professional associations),<sup>6</sup> Congress refused to accede:

Clearly, the original FTC law was not intended to cover nonbusiness activities. . . . [T]he agency has more than enough to do in regulating business concerns without the need to extend its jurisdiction to regulate non-business groups -- groups which are completely different from business organizations in purpose, intent, and "ownership." . . . [D]uring hearings on the bill . . . [o]rganizations, including the American Association of Medical Colleges, the American Dental Association, and the American Medical Association pointed out the detrimental and potentially debilitating effects upon the nonbusiness activities of not-for-profit organizations that FTC regulation could have. 123 CONG. REC. H33,622 (daily ed. Oct. 13, 1977) (remarks of Rep. Broyhill).<sup>7</sup>

This later legislative history "throw[s] a cross light" on the interest of Congress in 1914 that, together with the language

<sup>6</sup> See *Proposed Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 69 (1977) ("The bill would make several changes in the jurisdiction of the Commission. In particular, it would: (1) Broaden the reach of the FTC Act by redefining 'corporation' to include nonprofit corporations") (statement of Commission Chair Collier).

<sup>7</sup> See also H.R. Rep. No. 95-339, at 120 (1977) (minority report) ("At the present time, the jurisdiction of the Commission is limited to profit-making bodies. The effect of this provision would have been to extend the regulatory reach of the FTC to non-profit organizations. The full Committee deleted this provision and we fully concur in the Committee's decision in this regard. In reviewing the record, we note that the FTC made a very weak case for extending its jurisdiction in this fashion. On the other hand, the non-profit groups presented a very strong case in favor of deleting the new provision.")

and legislative history of the 1914 FTC Act, shows that the FTC lacks jurisdiction over nonprofit, professional associations. See *Pipefitters Local 562 v. United States*, 407 U.S. 385, 411-12 (1972) (actions of later Congress, in combination with language and history of earlier enactment, illuminate the meaning of earlier enactment).

The Congressional decision to exclude nonprofit, professional associations from FTC jurisdiction leaves no gap in federal antitrust enforcement. The Sherman and Clayton Acts provide authority for antitrust proceedings against these entities in federal court by the Department of Justice. Moreover, the States extensively regulate the professions under both federal and state antitrust laws. Congress wisely excluded nonprofit, professional associations from the FTC's jurisdiction in order to spare such associations the burden of administrative proceedings before a tribunal, which (as this case demonstrates) has no special expertise in, or sensitivity to, their affairs.

B. The CDA epitomizes the kind of non-business entity that Congress chose to exclude from regulation by the FTC. It is an association of dentists -- not of industrial corporations or dealers. It is organized neither to conduct business within the meaning of the FTC Act nor to seek profit for itself. To the contrary, it is organized and operates as a nonprofit corporation under California law. Pet. App. 161a-62a. It is predominantly devoted to educational, scientific, and public health goals. Not surprisingly, therefore, it has been recognized by the Internal Revenue Service as a corporation "not organized for profit" under 26 U.S.C. § 501(c)(6). *Id.* at 174a.

Nor is the CDA organized to produce profit for its members. The traditional and generally accepted meaning of the word "profit" is gain over and above expenditures or investment. *Community Blood Bank*, 405 F.2d at 1018-19. An entity is not organized to carry on business for profit unless it is designed to

accumulate gain for distribution to shareholders or members. The CDA is not organized for these purposes. Indeed, in recognizing the CDA as exempt from payment of federal income tax pursuant to 26 U.S.C. § 501(c)(6), the IRS had to find that "no part of the net earnings" of the CDA "inures to the benefit of any private shareholder or individual."

Despite the language and legislative history of the FTC Act, the court of appeals held that the CDA is subject to FTC jurisdiction. Citing *AMA v. FTC*, 638 F.2d at 448, the court concluded that, although a nonprofit, professional association "may not directly distribute 'gain' to [its] members in the same sense as a for-profit corporation," it is nonetheless a "corporation[]" subject to FTC regulation if "the organization provides tangible, pecuniary benefits to its members." *California Dental Ass'n.*, 128 F.3d at 726. This ruling, like the decision in *AMA* on which it relied, does violence to the plain language of the Act. The Act speaks of corporations that are "organized to carry on business for . . . profit" - not professional associations that are "organized" as nonprofit corporations but that provide some "pecuniary benefits" for members. The lower court's omission of the words "organized to carry on business for" from its definition of corporation, and its substitution of "pecuniary benefits" for the statutory term "profit" distort the language and plain meaning of section 4.

The proper construction of section 4 of the FTC Act, 15 U.S.C. § 44, is illustrated in *Community Blood Bank*, 405 F.2d at 1022. There, the Eighth Circuit held that a nonprofit hospital association and a community blood bank were outside the FTC's authority. The hospital association closely resembled the CDA for purposes of this case. Like the CDA, the hospital association in *Community Blood Bank* was organized as a nonprofit corporation and performed numerous eleemosynary functions. In addition, however, the hospital association served certain business interests of its member hospitals -- assisting in

the training and procurement of personnel, providing coordinated planning and financing, and furnishing a forum for resolving questions by pathologists. See *Community Blood Bank of Kansas City Area, Inc.*, 70 F.T.C. 728, 863-64 (1966), *annulled by* 405 F.2d 1011 (1969). Indeed, the FTC explicitly found that the association "performed very valuable services" for its members. *Id.* at 864.

Nevertheless, the Eighth Circuit recognized that the test of jurisdiction under the FTC Act is whether an entity is "organized to" carry on "business for profit within the traditional meaning of that language." 405 F.2d at 1018 (emphasis omitted). Profit is gain from business or investment over and above expenses, not some incidental economic benefit conferred by an association's activities. Thus, the court held that whether the FTC has jurisdiction over a corporation depends on the "reality" of whether the corporation "in law and in fact" operates as a nonprofit organization. 405 F.2d at 1019. Under this test, the FTC was held to lack jurisdiction over the hospital association. Similarly, it should be held to lack jurisdiction over the CDA.<sup>8</sup>

C. To be sure, this Court has upheld FTC orders against associations. See, e.g., *FTC v. Superior Court Trial Lawyers Professional Ass'n*, 493 U.S. 411 (1990); *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). Significantly, the question of

jurisdiction was not considered in those cases. Accordingly, the issue was not decided by this Court. See *Steel Co. v. Citizens for a Better Env't*, 118 S.Ct. 1003, 1011 (1998) ("drive-by jurisdictional rulings . . . have no precedential effect").

Moreover, these cases do not suggest, contrary to the language and legislative history of the Act, that Congress intended to subject traditional nonprofit, professional associations to FTC jurisdiction. In both *Superior Court Trial Lawyers Association* ("SCTLA") and *Indiana Federation of Dentists* ("IFD"), the respondents were organized for the express purpose of carrying on business to obtain a profit for their members. The Superior Court Trial Lawyers Association was a "loosely-organized unincorporated association [which] served as the rallying point for the 1983 campaign waged by [Civil Justice Act] lawyers to increase their fees." *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 513, 516 (1986). And the FTC found that "[t]he 'objectives' of [the Indiana Federation of Dentists], as set forth in Article I, Section 2 of its constitution and by-laws, [we]re essentially 'to represent the economic interests of Indiana dentists as a labor organization.'" *Indiana Fed'n of Dentists*, 101 F.T.C. 57, 74 (1983). Here, by contrast, the purpose of the CDA is "to promote high professional standards in the practice of dentistry," and "to encourage and promote the art and science of dentistry as a profession." Pet. App. 161a-62a. The contrast between the purposes of the CDA and those of the SCTLA and IFD simply serve to underscore the impropriety of the assertion of FTC jurisdiction in this case.

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Section 4 of the FTC Act should be given its plain meaning. The carefully circumscribed definition of "corporation" enacted by Congress will mean little if nonprofit associations which are organized to advance science, education, public health,

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<sup>8</sup> The FTC plainly has the power to determine that an association's claimed status as a nonprofit is a sham and that the association is in fact organized to engage in business for profit or to funnel profit to "members." See, e.g., *Ohio Christian College*, 80 F.T.C. 815, 833, 849 (1972) (determining that the FTC had jurisdiction over titular nonprofit after finding that the nonprofit was a "shell" designed to further the financial interests of an individual). But a genuine nonprofit association -- that is, an association not organized in order to pursue either its own profit or that of its members -- is not subject to the FTC's jurisdiction.

professional ethics, and *pro bono* activities become subject to FTC jurisdiction any time that they offer a credit card, favorable rental car rates, discounted insurance premiums, or other pecuniary benefits to members. Section 4 excludes associations not "organized to carry on business for . . . profit" from the FTC's jurisdiction. It leaves to the federal courts enforcing the Sherman Act the delicate task of accommodating the legitimate non-commercial purposes and activities of nonprofit associations with the goals of the antitrust laws. If the FTC believes that, as a result, "there exists a deficiency in the Act, the cure must come from Congress, not by judicial enlargement of the statute." *Heater v. FTC*, 503 F.2d 321, 327 (9th Cir. 1974). See *Reiter*, 442 U.S. at 345.

II. ETHICAL GUIDELINES THAT DISCOURAGE DECEPTIVE ADVERTISING BY DENTISTS SHOULD BE EVALUATED BY APPLYING A THOROUGH ANALYSIS OF THE COMPETITIVE SIGNIFICANCE OF SUCH GUIDELINES AND SHOULD BE FOUND TO SATISFY ANTITRUST REQUIREMENTS.

A. The "prevailing standard" for evaluating alleged restraints of trade is a traditional "rule of reason" analysis. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). In that analysis, "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.). A defendant's motive is relevant -- "not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Id.*

In *NCAA*, this court stated that, in certain limited situations, "no elaborate industry analysis is required to demonstrate the

anticompetitive character" of an inherently suspect, "naked" restraint. 468 U.S. at 109 (quoting *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)). The Court repeated this principle in *Indiana Fed'n of Dentists*, 476 U.S. at 459.

The "quick-look" approach suggested by these decisions has no application here. The ethical guidelines of the CDA are not a naked restraint of trade. To the contrary, they require additional disclosures to reduce the potential for deception in price advertising by dentists, and they characterize certain quality claims in dental advertising as inherently deceptive. They do not on their face adversely affect price or output. And, as explained below, the guidelines serve substantial procompetitive ends. Finally, they were issued by an association to which no dentist need belong in order to compete effectively and to which many dentists choose not to belong. Pet. App. 144a, 161a-62a, 245a. There is nothing inherently suspect about facially justifiable rules against misleading advertising.<sup>9</sup> If quick-look analysis may be used to strike down the ethical guidelines here, it is properly applicable in any case, and the quick-look approach will have swallowed the traditional rule of reason.

Indeed, the ethical pronouncements of the CDA are singularly inappropriate for application of a truncated rule of reason. This Court has repeatedly observed that "by their nature,

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<sup>9</sup> The ethical rules at issue here bear no resemblance to the restraints of trade addressed in *Professional Eng'rs*, 435 U.S. at 684-85 (an ethical rule banning all competitive bidding by professional engineers), and *Indiana Fed'n of Dentists*, 476 U.S. at 462-63 (a concerted refusal by dentists to provide insurance companies with dental x-rays to determine whether to reimburse a patient for a particular treatment). Unlike the rules at issue in those cases, the ethical canons of the CDA are supported by strong procompetitive justifications.

professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary." *National Soc'y of Prof'l Eng'rs*, 435 U.S. at 696. In *Goldfarb*, the Court explained that:

[t]he fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

421 U.S. at 788-89 n.17.

Given that the ethical guidelines at issue are not inherently suspect, the fact that they "operate[ ] upon a profession" suggests that they should not be cavalierly dismissed after only a quick-look. It is incorrect both to assume that such guidelines are anticompetitive and to place the burden of proof on the respondent association to show that they are not.<sup>10</sup>

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<sup>10</sup> Other courts of appeals have faithfully followed this Court's teaching that quick-look analysis is inappropriate unless a restraint is inherently suspect and unsupported by any procompetitive justification. *See, e.g., United States v. Brown University*, 5 F.3d 658, 678 (3d Cir. 1993) (reversing a district court decision that had applied an abbreviated rule of reason analysis to a college association's agreement to award financial aid only to needy students and to set the amount of family contributions paid by commonly admitted students); *Vogel v. American Soc'y of Appraisers*, 744 F.2d 598, 603 (7th Cir. 1984) (Posner, J.) (refusing to apply quick-look rule of reason analysis to an ethical rule unless "it has clear anticompetitive consequences and lacks any redeeming (continued...)

B. Proper application of the rule of reason demonstrates that the ethical guidelines of the CDA are, on balance, procompetitive and therefore accord with antitrust requirements. First, an understanding of the reason for the guidelines suggests their procompetitive purposes. Specifically, the guidelines were issued in order to discourage the misleading of consumers in dentistry -- a field in which deception by the unscrupulous is easy and carries with it particularly unfortunate consequences. As this Court recognized more than sixty years ago:

The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief.

*Semler v. Oregon State Bd. of Dental Exam'rs*, 294 U.S. 608, 612 (1935). The ethical canons of the CDA are simply the exercise by that Association of its "special role" in resolving "the problems in defining the boundary between deceptive and nondeceptive advertising" and in assuring that advertising by professionals "flows both freely and cleanly." *See Bates*, 433 U.S. at 384. *See also Professional Eng'rs*, 435 U.S. at 696 ("the problem of professional deception is a proper subject for an ethical canon").

Second, the effect of the CDA guidelines is to promote competition both among dentists generally and between those who choose to join the CDA and those who do not. The CDA

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<sup>10</sup> (...continued)  
competitive virtues").

guidelines exhort dentists who advertise discounts to include information necessary to enhance consumer comprehension of the discount. They oppose claims of low prices that do not answer the question "Low compared to what?" The nonprice provisions urge dentists who subscribe to the CDA's canons to avoid claims of quality or comfort that are not verifiable.

Discouraging deceptive advertising promotes competition by helping to ensure that consumers receive accurate information about services. See *Bates*, 433 U.S. at 364 ("commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system") (citing *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603-04 (1967) (Harlan, J., concurring)). Thus, this Court has repeatedly recognized the procompetitive nature of the sort of professional self-regulation at issue here, albeit in the context of First Amendment challenges to professional ethics rules.

With respect to disclosures necessary to make price advertising by professionals non-deceptive, this Court in *Zauderer* upheld state law requirements that attorneys who advertise their willingness to represent clients on a contingent-fee basis must also state the contingent-fee rate and that the client may have to bear certain expenses even if he or she loses. 471 U.S. at 650-53 & n.15. In so doing, the Court relied on the "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. Critically for purposes of this case, the Court reasoned that disclosure requirements generally provide information of value to consumers -- *i.e.*, are procompetitive -- and should be upheld "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651 (footnote omitted). See also *Bates*, 433 U.S. at 375 (a profession "retains the power to correct omissions that have the

effect of presenting an inaccurate picture[;]" "the preferred remedy is more disclosure").

With respect to unverifiable quality claims, this Court in *Bates* stated that "claims as to the quality of services" may be deceptive where they are "not susceptible of measurement or verification" and are therefore "so likely to be misleading as to warrant restriction." 433 U.S. at 383-84. See also *Zauderer*, 471 U.S. at 640 n.9. Ethical rules forbidding misleading and deceptive advertising protect the flow of accurate information to consumers and thus promote competition. See, e.g., *In re R.M.J.*, 455 U.S. 191, 203 (1982).

The ethical guidelines of the CDA promote competition in yet another way. They seek to enhance the reputation of members of the CDA for honesty in dealing with patients and thereby to increase the desire of patients to utilize the services of these dentists -- as opposed to dentists who do not adhere to CDA canons. Self-regulation of this sort promotes competition by making services of CDA members more attractive. Cf. *Florida Bar*, 515 U.S. at 625, 635 (upholding prohibitions on attorney solicitation justified as necessary to "protect the flagging reputations of Florida lawyers" and to "prevent[] the erosion of confidence in the profession"). See also *NCAA*, 468 U.S. at 114 (recognizing that a practice which enhances the public's desire for a product or service may be procompetitive).

Finally, it is significant for antitrust purposes that non-members are not bound to follow the guidelines of the CDA and that many dentists choose not to join that organization -- without suffering any adverse competitive effect. Pet. App. 245a-46a. These facts do not, by themselves, immunize the CDA's ethical guidelines from antitrust scrutiny. As Commissioner Azcuenaga recognized in her dissent at the FTC, however, they do require solid and convincing proof that the guidelines actually have had an adverse effect on competition in

a properly defined market. Such proof is utterly lacking in the record of this case.

C. As this case demonstrates, improper application of the rule of reason to ethical guidelines of the professions exposes to unwarranted antitrust condemnation self-regulatory activities that serve the public interest. In addition, concern about misapplication of the rule of reason may cause associations which cannot bear the financial consequences of protracted antitrust proceedings to issue ethical statements that are so general that they do not provide as much guidance as they could and should. Such statements may provide protection from FTC scrutiny, but they offer practitioners no useful elaboration on the sorts of representations that could be misleading or on the sorts of disclosures that might minimize deception.

Many professional associations, including the American Bar Association ("ABA"), the AMA, and the ADA, have promulgated ethical guidelines designed to prevent deceptive advertising and to encourage behavior that will advance the interests of those served by its members. For example, Part 7 of the ABA's Model Rules of Professional Conduct addresses lawyer advertising. Center for Prof'l Responsibility, ABA, ANNOTATED MODEL RULES OF PROF'L CONDUCT, 3d. ed. 483 (1996). Rule 7.1 forbids lawyers to make any "false or misleading communication"; subsection 7.1(b) defines as false and misleading any statement "likely to create an unjustified expectation about results the lawyer can achieve;" and subsection 7.1(c) similarly defines any statement comparing a lawyer's services with those of any other lawyer "unless the comparison can be factually substantiated." *Id.* These prohibitions bear a close resemblance to the CDA ethical statements at issue. See also Opinion 5.02, AMA, CODE OF MED. ETHICS (1994) (interpreting the prohibition of false and misleading statements to encompass incomplete pricing disclosures and subjective claims about the quality of medical

services); Section 5-A, ADA, PRINCIPLES OF ETHICS AND CODE OF PROF'L CONDUCT 8 (1995) (to same effect); NASW CODE OF ETHICS § 4.06(c) (calling for accuracy in representations "of professional qualifications, credentials, education, competence, affiliations, services provided [and] results to be achieved"); STANDARD OF PRACTICE 12-1, NAR CODE OF ETHICS AND STANDARDS OF PRACTICE (authorizing use of the term "free" and similar terms in advertising by Realtors® "provided that all terms governing availability of the offered product or service are clearly disclosed at the same time").

These ethical positions serve to promote the dissemination of accurate information to patients and clients, to prevent the often tragic injuries that occur when people fall victim to unscrupulous or incompetent practitioners, and to breed public trust and confidence in persons who subscribe to them. They are intended to carry out the historic role of the professions to regulate themselves in the public interest. As such, they are precisely the sort of statements that should receive full consideration of their purposes, their context, and their competitive effects -- that is, that should be judged under full rule of reason analysis. Such analysis will generally demonstrate, as it demonstrates in this case, that the ethical statements of professional associations satisfy antitrust requirements. Yet, all of these legitimate self-regulatory efforts are called into question by the erroneous analyses applied in the decisions below.

\* \* \* \*

In two respects, the FTC overreached in this case: First, the FTC exceeded the proper scope of its authority by challenging the ethical rules of a nonprofit, professional association. Second, it clearly demonstrated why Congress decided not to burden nonprofit, professional associations with antitrust scrutiny by an agency insensitive to the realities of such

associations. It condemned a responsible effort at self-regulation without a thorough economic analysis of the regulation's effect on competition. On both grounds, this Court should reverse the judgment of the Court of Appeals.

### **CONCLUSION**

For all of these reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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FOR ARGUMENT

(15)

97-1625

Supreme Court, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1998

California Dental Association,

**SHELF COPY**

Petitioner,

v.

Federal Trade Commission

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**OPPOSITION OF CALIFORNIA DENTAL ASSOCIATION TO MOTION FOR LEAVE  
TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE CONSUMER DENTAL  
CHOICE PROJECT OF THE NATIONAL INSTITUTE FOR SCIENCE, LAW AND  
PUBLIC POLICY, INC.**

The California Dental Association ("CDA") respectfully submits this opposition to the motion of the Consumer Dental Choice Project of the National Institute for Science, Law and Public Policy, Inc. (the "Project") to file a brief *amicus curiae* in this case. CDA declined the Project's request to consent to the filing because CDA believed that the Project's *amicus* brief would fail to raise relevant matter not already addressed by the parties, as required by Supreme Court Rule 37.1, and, based on prior experience, CDA believed that the Project would likely include in its brief irrelevant and scandalous matter in violation of this Court's Rule 24.6. A review of the Project's motion and brief confirms CDA's concerns.<sup>1</sup>

<sup>1</sup> The Project complains that CDA "has not consented to a single *amicus* on the other side." Mot. ii. However, the Project is the only entity that has requested CDA's consent. The only

## I. THE PROJECT'S BRIEF FAILS TO RAISE RELEVANT MATTER NOT ALREADY ADDRESSED BY THE PARTIES

The Project's motion identifies three matters raised in its *amicus* brief. Each matter has either been raised by the parties or is irrelevant to the questions before the Court. First, the Project states that it will argue that this Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), "demolished" the so-called "learned profession" exception to the antitrust laws. Mot. ii. CDA does not argue that there is such an exception. Indeed, citing *Goldfarb*, CDA admits that it is subject to the Sherman Act. Pet. Br. 26, n.8. Moreover, the government devotes a whole section of its brief to this argument. Resp. Br. 23-25.

The Project also asserts that it will argue that the Federal Trade Commission's jurisdiction has already been decided "*sub silentio*" and "there really is no conflict in the Circuits." Mot. ii-iii. This issue is also fully aired in the government's brief. Resp. Br. 20-22. The Project's proposed brief fails to bring any different or unique perspective to either of these two issues.

Finally, the Project asserts that it will "point out" certain alleged anticompetitive practices of the American Dental Association ("ADA") and "sister state dental associations." Mot. iii. This issue is wholly irrelevant to the questions before the Court. The ADA is not, and has never been, a party to this case. Nor is any "sister" state dental association a party. The only parties in this litigation are CDA, a wholly independent legal entity, and the Federal Trade Commission. As the Project's motion makes clear, its unfounded assertions of anticompetitive practices relate to the use of certain dental filling materials. Such alleged conduct has never been an issue in this case at any stage. This case is confined to the narrow issue of CDA's advertising

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other *amici* on behalf of the Respondent are 27 states, which under this Court's rules may file without the consent of either party. SUP. CT. R. 37.5.

guides relating to price and quality, a world removed from the scurrilous and unfounded allegations in the Project's proposed brief.

The Project has ignored this Court's admonition that an *amicus* brief which fails to raise relevant matter not already raised by a party "simply burdens the staff and facilities of the Court and its filing is not favored." SUP. CT. R. 37.1

## II. THE PROJECT'S BRIEF RAISES IRRELEVANT AND SCANDALOUS MATTERS IN VIOLATION OF THIS COURT'S RULES

The Project's real purpose in seeking to file its *amicus* brief is apparent from the fact that almost one-half of its argument is devoted to a diatribe against the ADA, who is not a party to this litigation, on a matter that lacks even the remotest connection to any issue before the Court. Project Br. 11-14. The Project devotes three and one-half pages to unsupported allegations about ADA's alleged anticompetitive practices. The Project's principal complaint against ADA apparently relates to ADA's alleged position on the use of certain dental filling materials. Not only does the Project raise this irrelevant issue as to a non-party, it casts unfounded aspersions against ADA's motives and integrity. It refers to ADA as an "economic colossus" engaged in a "massive anticompetitive campaign" to "drive nonmember dentists out of business." Project Br. 11-12. These reckless and irresponsible assertions are made without any effort to provide factual support -- because no such support exists. Moreover, as a nonparty, ADA is unable to respond to these charges. It is apparent that the Project simply seeks to use this Court as a forum to vent its ill will against ADA.

The Project has blatantly disregarded this Court's requirement that all briefs be "free from burdensome, irrelevant, immaterial, and scandalous matter." SUP. CT. R. 24.6. This Court has warned that briefs that fail to comply with these requirements "may be disregarded and stricken by the Court." *Id.*

### **Conclusion**

The Project's proposed brief makes no effort to comply with this Court's Rules 24 and 37. Therefore, CDA respectfully requests that the Court deny the Project's motion to file its brief *amicus curiae* in this matter.

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CALIFORNIA DENTAL ASSOCIATION,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent,*

On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN COLLEGE FOR  
ADVANCEMENT IN MEDICINE  
AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER

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**QUESTION PRESENTED**

Whether, under Section 4 of the Federal Trade Commission Act, the Commission's jurisdiction over entities "organized to carry on business for [their] own profit or that of [their] members" extends to nonprofit professional associations.

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## INTEREST OF *AMICUS CURIAE*

The American College for Advancement in Medicine (ACAM) is a nonprofit medical society dedicated to scientific, educational and public health purposes. Membership in ACAM requires an unrestricted license to practice medicine, and ACAM has more than 1,000 member physicians in the U.S. and worldwide.<sup>1/</sup> As set forth in its Articles of Incorporation, ACAM is organized solely for nonprofit purposes. Its founding documents prohibit ACAM from "operat[ing] for pecuniary gain or profit" and from distributing any gains, profits or dividends to its members.<sup>2/</sup>

ACAM's activities, all of which are directed toward its scientific, educational and public health purposes, consist of

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1/ Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus* and its counsel made any monetary contribution to the preparation or submission of this brief.

Pursuant to Rule 37.2(a) of the Rules of this Court, *amicus* states that both parties have granted written consent to the filing of this brief. The parties' consent letters have been filed with the Clerk of the Court.

2/ ACAM's Articles of Incorporation state in pertinent part:

This corporation is not organized, nor shall it be operated for pecuniary gain or profit, and it does not contemplate the distribution of gains, profits, or dividends to its members and is organized solely for nonprofit purposes. The property, assets, profits and net income of this corporation are irrevocably dedicated to scientific and educational purposes, and no part of the profits or net income of this corporation shall ever enure to the benefit of any director, officer, or member or to the benefit of any private shareholder or individual.

educating physicians, advancing and supporting scientific research, and developing public awareness of emerging therapies in complementary/alternative medicine and preventive medical practices. ACAM is an accredited sponsor of the Accreditation Council for Continuing Medical Education (ACCME). ACAM does not sponsor or conduct programs or courses on medical practice management or other subjects involving the business as opposed to the medical and scientific interests of its members. ACAM does not offer insurance or retirement benefits to its members; it does not offer its members credit cards, legal or financial services; and it does not have a lobbying program. ACAM does not generate any unrelated business income. In sum, ACAM is organized and operates as a *bona fide* nonprofit medical society.

ACAM is keenly interested in the jurisdictional issue now before the Court, not only because it, like petitioner California Dental Association (CDA), is a nonprofit professional association but also because ACAM has been, for the past three years, the subject of a Federal Trade Commission law enforcement investigation. The effect of the Commission's investigation has been to deplete ACAM funds; divert financial and human resources away from its scientific, educational and public health goals; and inhibit the ability of ACAM and its members to engage in the free exchange of ideas concerning the use of complementary and alternative medical therapies.

The purpose of this brief is to give the Court a perspective on the jurisdictional issue that neither party can offer, and that was not presented by the other *amici* at the petition stage. Through this brief, ACAM seeks to inform the Court of some practical consequences that flow from the Commission's assertion of jurisdiction over nonprofit professional associations

— consequences that threaten principles of federalism and may adversely affect the public health.

ACAM brings a unique perspective to the Court's consideration of this critical issue in two ways. First, while ACAM shares CDA's status as a nonprofit professional association, the scope of ACAM's activities and the benefits ACAM offers to its members, both of which are described above, are substantially more limited than CDA's. The fact that the Commission seeks to exert jurisdiction over both CDA and ACAM shows that the "pecuniary benefits" test it is applying, and now advocates to the Court, is an unreasonable and unworkable interpretation of the jurisdictional limitation in Section 4 of the FTC Act. 15 U.S.C. § 44. Second, while the Commission's action against CDA is based on antitrust issues, its investigation of ACAM was initiated by the Commission's Bureau of Consumer Protection and involves allegations of allegedly unsubstantiated representations about a safe, legitimate medical treatment that has been administered by thousands of physicians for more than forty years. The Commission's position in this regard goes to the heart of the medical practices of ACAM's members and the doctor-patient relationship, and thereby implicates First Amendment and related issues that generally do not arise from the Commission's antitrust actions against nonprofit professional associations. ACAM respectfully submits that these issues are highly relevant to the jurisdictional question now before the Court.

## SUMMARY OF ARGUMENT

Section 4 of the FTC Act limits the Commission's jurisdiction to entities "organized to carry on business for [their] own profit or that of [their] members" (15 U.S.C. § 44), reflecting Congress' intent to limit the Commission's jurisdiction to for-profit, commercial organizations. Contrary to the plain meaning of the statute, the Commission has created a "pecuniary benefits" test for interpreting Section 4 that has resulted in an improper expansion of its authority. The Commission has made small nonprofit associations an enforcement priority, and many such associations have acquiesced in consent orders as the only practical option for resolving the Commission's charges.

The current conflict among the circuits regarding the proper test for assessing whether an association is subject to the Commission's authority arose from cases during the past thirty years from the Eighth and Second Circuits.

Under the Eighth Circuit's test, a jurisdictional determination is based on the language of Section 4 and is reached by considering whether an association is organized to carry on "business for profit within the traditional meaning of that language." *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1018 (8<sup>th</sup> Cir. 1969). The Eighth Circuit reversed the Commission's decision that it possessed jurisdiction over the blood and hospital associations and, in so doing, rejected the Commission's analysis of jurisdiction based on an examination of the business activities of the associations.

The Second Circuit, however, adopted a similar Commission analysis that scrutinizes a "spectrum of activities" conducted by the association. *American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), aff'd without opinion by an equally divided court, 455 U.S. 676 (1982). In finding that the "business aspects" of the AMA are within the Commission's jurisdiction, the court accepted the Commission's reasoning that it could use as a substitute for actual profits "pecuniary benefits" an association confers, even indirectly, on its members as a justification for exercising jurisdiction over a broad range of the association's activities.

The Ninth Circuit in the case now before the Court chose to apply the more "expansive view of 'profit'" that the Second Circuit followed in *AMA*. *California Dental Assn. v. FTC*, 128 F.3d 720 (9<sup>th</sup> Cir. 1997).

The "spectrum of activities"/"pecuniary benefits" analysis departs from the clear meaning of Section 4 and permits the Commission to exert jurisdiction over virtually any activity of any association. The *AMA* and *CDA* courts included a very broad range of activities among those that can confer "pecuniary benefits" on members -- including activities that primarily benefit the public, but may also be beneficial to the association's members. In its investigation of ACAM, the Commission based its assertion of jurisdiction on activities it had previously told the courts were "non-entrepreneurial" and thus outside its jurisdiction. Moreover, even when those activities were shown to represent only two to three percent of ACAM's total budget, the Commission still adhered to its jurisdictional determination.

The Commission's failure to observe the constraints of Section 4 has encouraged the agency to involve itself in "practice of medicine" issues, even though it told Congress it would not interfere in those areas that are the responsibility of the states.

The *Community Blood Bank* test is a proper interpretation of Section 4 of the FTC Act. Nevertheless, it still leaves open to question the kinds of activities that might bring a nonprofit association within the jurisdiction of the Commission. The Court should clarify the distinction between profit-making activities and nonprofit services, which are especially difficult to distinguish in the context of professional associations, and instruct the Commission to follow a clarified *Community Blood Bank* test in assessing its jurisdiction under Section 4.

## ARGUMENT

### I. THE "PECUNIARY BENEFITS" TEST IS INCONSISTENT WITH THE NARROW BASIS FOR JURISDICTION OVER NONPROFIT ASSOCIATIONS DEFINED IN SECTION 4 OF THE FTC ACT AND PERMITS THE COMMISSION TO IMPROPERLY EXPAND ITS AUTHORITY

Section 4 of the FTC Act limits the Commission's jurisdiction to entities "organized to carry on business for [their] own profit or that of [their] members." 15 U.S.C. § 44. Section 4 reflects Congress' intent to limit the Commission's jurisdiction to for-profit, commercial organizations. Despite the fact that neither the statutory language itself nor the legislative history of Section 4 supports a narrow application of this nonprofit jurisdictional limitation, the Commission has created

a "pecuniary benefits" test for interpreting Section 4 that permits it to take an extraordinarily expansive view of its authority. In so doing, it has strayed far from the role Congress intended it to play in regulating the activities of nonprofit entities. Indeed, the Commission has made the investigation of relatively small nonprofit associations an enforcement priority in recent years.

Most of the Commission's association cases, like its investigation of ACAM, culminate in consent orders. Acquiescence in a consent order is most often the only practical option for nonprofit organizations who operate on shoestring budgets that do not reflect the important services they often provide to the public as well as their members. The budget of a small association like ACAM, for example, simply cannot support a challenge to the Commission's jurisdiction, much less a full-blown defense to Commission charges. Of the Commission's litigated cases against nonprofit associations, the issue of jurisdiction has been raised in very few. The Commission's opposition to CDA's petition for a writ of *certiorari* includes within a "long line of cases" cited as support for its position those cases in which jurisdiction was not contested. Opp. 16 n.5. Clearly, however, the fact that jurisdiction was not challenged in a particular case cannot lend credence to the Commission's view that a real conflict over the proper interpretation of Section 4 does not exist. Any number of reasons could explain why the issue was not raised or litigated, including budgetary constraints and the nature of the organization itself, since not all nonprofit associations are exempt from the Commission's jurisdiction.

The current conflict over the Commission's nonprofit jurisdiction arose from cases during the past thirty years from

the Eighth and Second Circuits. The first was decided in 1969, when the Eighth Circuit addressed the question of the Commission's authority over hospital and blood bank associations. The court made its jurisdictional determination by considering whether the associations were organized to carry on "business for profit within the traditional meaning of that language." *Community Blood Bank* at 1018, emphasis added. An important part of the court's determination was its conclusion that engaging in some business activities does not bring a nonprofit association within the Commission's jurisdiction. *Id.* at 1019. A decade later, in a case involving the American Medical Association (AMA), the Second Circuit applied a very different test that relied not on the traditional meaning of the statutory language, but strictly on a new characterization of a "spectrum of activities" in which nonprofit associations engage. In finding "[t]he business aspects of the activities of the petitioners [to] fall within the scope of the Federal Trade Commission Act" (*AMA* at 448), the court adopted the Commission's jurisdictional analysis that was based on a determination whether the association provides "tangible, pecuniary benefits" within its spectrum of activities for members. In the matter now before the Court, the Ninth Circuit applied this "spectrum of activities"/ "pecuniary benefits" test.

ACAM respectfully submits that the "spectrum of activities"/"pecuniary benefits" test is inconsistent with the plain meaning of Section 4, which defines a narrow basis for Commission jurisdiction over nonprofit associations. Moreover, it is, as a practical matter, an unworkable means of determining whether a nonprofit entity is within or outside the scope of Section 4. For the reasons described herein, this test has permitted the Commission to improperly expand its jurisdiction to the point where the Section 4 nonprofit limitation

is virtually meaningless. Despite its assurances against jurisdictional overreaching made in its briefs to the courts and before Congress, the Commission has applied its "pecuniary benefits" test in a way that can bring essentially any organization and any activity within its sphere of authority.

In *Community Blood Bank*, the Eighth Circuit specifically rejected the notion that a nonprofit association becomes a profit-making entity under Section 4 simply by engaging in some activities that a commercial enterprise engages in. The Commission had found that both the blood bank and hospital organizations "performed very valuable services" for their members that were "in the broadest sense exceedingly profitable for the doctors and the hospitals to receive." *Community Blood Bank*, 70 F.T.C. 728, 767 (1966). The hospital association was found by the Commission to be within its jurisdiction because it "is also engaged in business for the benefit or profit of its members when it supplies to them information and other services which they might otherwise have to gather and render themselves. *Id.* at 909 - 910. But the Eighth Circuit rejected the Commission's analysis and held that so long as nonprofit entities are "validly organized and existing under nonprofit corporation statutes . . . [and] do not distribute any part of their funds to and are not organized for the profit of members or shareholders" then they remain beyond the reach of the FTC. *Community Blood Bank*, 405 F.2d at 1019.

The test established by the Eighth Circuit in *Community Blood Bank*: whether the organization "engages in business for profit within the traditional meaning of that language" (*id.* at 1018) is simple, understandable and based on the wording of Section 4 itself. In rejecting the Commission's analysis of the association's activities as a basis for jurisdiction, the court

adopted the reasoning Commissioner Elman expressed in his “cogently worded” dissent from the Commission’s opinion. Drawing an analogy to a “religious association [that] might sell cookies at a church bazaar,” Commissioner Elman had recognized that activities such as selling blood for profit are “of no relevance” to the question of FTC jurisdiction as long as any income gained is devoted to the nonprofit purposes of the organization. *Id.* at 1019. Reversing the Commission’s finding of jurisdiction, the court quoted Commissioner Elman’s criticism of the “clear import of the Commission’s holding . . . [as reading] Section 4 out of the Act altogether and hold[ing] . . . that its jurisdiction under the Act embraces *all* corporations, profit and nonprofit alike, whatever the circumstances.” *Id.*

In the two subsequent cases to test its jurisdiction over nonprofit associations, the Commission has escaped the jurisdictional boundaries set by the Eighth Circuit in *Community Blood Bank* by utilizing essentially the same analysis the Eighth Circuit rejected because of its potential to read Section 4 out of the FTC Act.

When *AMA* went to the Second Circuit, the Commission’s brief to the court began by recognizing the limitations Section 4 imposes on its jurisdiction over nonprofit associations and by acknowledging the approach taken by the *Community Blood Bank* court. Respondent’s Brief at 34-36, *AMA v. FTC*. But the Commission then departed from a basic “business for profit” test and instead described “a spectrum of association activities, ranging from the purely eleemosynary to the purely commercial” (*id.* at 32) that it would examine in deciding the jurisdictional issue. The Commission put charitable, cultural, educational and scientific activities at the “non-entrepreneurial” end of the spectrum (*id.*), concluding that the *AMA*’s activities

devoted “to the advancement of medical science, education and public health, and . . . [its] scientific activities” (*id.* at 38) were not profit-promoting and therefore do not count in determining whether the association engaged in more than incidental commercial activity. Turning to the commercial end of the spectrum of association activities, the Commission’s brief identified “a wide variety of pecuniary benefits which *AMA* confers on its members” (*id.* at 37), including lobbying for government reforms, “dealing with third party payers,” participating in litigation involving government policies, and rendering business advice to its members. *Id.*

In the context of this “spectrum of activities” analysis, the Commission acknowledged, as the Eighth Circuit had in *Community Blood Bank*, that every association engages in some business activities, but that those activities must be substantial before jurisdiction can attach. In its brief, the Commission offered the court assurance against jurisdictional overreaching by saying that when a nonprofit association “serves both the profit-oriented entrepreneurial interests of its members and their non-entrepreneurial interests [the association] is within the scope of Section 4 [only] with respect to its profit promoting aspects”<sup>3/</sup> and only when the profit-oriented activities are substantial: “The commercial part of the spectrum is subject to the FTC Act but that part must be a substantial, not incidental, portion of the whole.” *Id.* (emphasis added). In practical

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<sup>3/</sup> *Id.* at 32. At oral argument before this Court in the *AMA* case, the FTC confirmed this jurisdictional analysis when it said, “the Commission does not claim broad jurisdiction over nonprofit associations. It claims jurisdiction over nonprofit associations made up of entrepreneurs when those associations are engaged in substantial part in operating for the profit of those entrepreneur members.” Record at 38-39, *AMA v. FTC* (No. 80-1690).

application, as ACAM's experience attests, this "substantiality" element has no more inhibited the Commission from asserting jurisdiction over nonprofit associations than has the "spectrum of activities" part of the test.

By replacing "business for profit" with a "spectrum of activities," the Commission advocated, and the Second Circuit adopted in *AMA*, a test for jurisdiction that represents a fundamental departure from the clear meaning of Section 4 that formed the basis of the *Community Blood Bank* holding. Both the Commission and the Second Circuit based their conclusions that the AMA fell within the scope of Section 4 on certain activities found to have conferred not profits but "pecuniary benefits" on the association's members. This test confounds the process of determining jurisdiction by requiring an examination of each and every "activity" an association engages in.<sup>4/</sup> Precisely what should count as eleemosynary rather than profit-promoting became almost impossible to divine and provoked the controversy that came to this Court in the AMA case sixteen years ago. The difficulty of analyzing a "spectrum of activities" was evident in the following exchange between this Court and counsel for the AMA:

MR. MINOW: Would you believe that it was contended here that our continuing education programs are for the profit of our members, because if you learn something

there, you'll get more patients. That's silly  
....

QUESTION: Is the cost of attending those programs deductible for income tax purposes?

MR. MINOW: I would think so, Justice Stevens.

QUESTION: Because they produce income.

MR. MINOW: I would think so, but I don't think that has anything to do with whether the AMA or the Connecticut Medical Society or the New Haven Medical Society were organized for the purpose of producing profit for their members. That's a different question.

QUESTION: I suppose, Mr. Minow, that if it is deductible, and I would assume that it is, it's on the same basis that a schoolteacher taking summer courses can deduct summer courses at the university.

MR. MINOW: To advance your skills or advance your - right. I would think so, Mr. Chief Justice.

QUESTION: But that isn't probably profit making except that it's profitable for the

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<sup>4/</sup> By comparison, the Eighth Circuit in *Community Blood Bank* found that marketing activities and profit making are "of no relevance" to the issue of whether the FTC has jurisdiction as long as any income is devoted to the nonprofit purposes of the organization. (*Community Blood Bank* at 1018.)

teacher in the long run, but we would hope for the public too.

Record at 14-16, *AMA v. FTC* (No. 80-1690).

There is no question that the continuing education of teachers, physicians, dentists, lawyers, and others who are privileged to practice a profession that serves the public may indirectly enhance the profit-making potential of those professionals. As the Court observed, however, that is not direct "profit making." Moreover, since most professional continuing education is mandatory, benefit to the public is quite clearly its principal purpose. Although the Commission mentioned the statutory nonprofit jurisdictional limitation a number of times when arguing in *AMA* in favor of its "pecuniary benefits" test, in practical effect, substitution of the "spectrum of activities" analysis for the Eighth Circuit's straightforward standard based on the language of Section 4 (whether the organization "engages in business for profit within the traditional meaning of that language") has invited the Commission to engage in exactly the kind of jurisdictional overreaching that the Eighth Circuit overruled in *Community Blood Bank*.

The difficulty the Court had in *AMA* and continuation of the same debate over the ensuing sixteen years to this day underline the fact that the "pecuniary benefits" test is an unworkable distortion of the statutory language. The case now before the Court demonstrates the need to articulate a test that clearly defines the boundaries of the Commission's jurisdiction. In affirming the Commission's conclusion that it has jurisdiction over CDA, the Ninth Circuit, like the Second Circuit in *AMA* has reverted to the approach taken by the Commission and

overruled by the Eighth Circuit in *Community Blood Bank*, thereby effectively gutting the jurisdictional exemption Congress wrote into Section 4 of the FTC Act.

In its brief to the Ninth Circuit in this case, the Commission acknowledged the statutory limitation on its jurisdiction and then defined the test, as it had in *AMA*, in terms of an examination of benefits the association provides, a characterization of the benefits as "economic" or "pecuniary" and an accounting of whether those "benefits are a 'substantial part of' [the association's] total activities." Respondent's Brief at 25, *CDA v. FTC*, 128 F.3d 720 (9<sup>th</sup> Cir. 1997). As in *AMA*, here too the Commission has identified an exceptionally broad range of activities as conferring "pecuniary benefits" – including lobbying and litigation affecting the association's members, insurance plans and practice management advice (*id.* at 24) – leading to the conclusion that CDA and its enforcement of advertising standards were within the Commission's jurisdiction.

In affirming the Commission's jurisdictional determination, the Ninth Circuit began by invoking the language of Section 4, stating that the "FTC's authority turns on whether [the CDA] is organized to carry on business for its own profit or that of its members." *CDA v. FTC*, 128 F.3d at 725. Then, although the *AMA* court had not explicitly announced a departure from the Eighth Circuit's reliance on the traditional meaning of the statutory language set out in *Community Blood Bank*, the Ninth Circuit recognized that the standards are indeed different. The court chose to apply the more "expansive view of 'profit'" (*id.* at 726) adopted by the Second Circuit in *AMA*: "tangible pecuniary benefits" to CDA members.

The folly of substituting a “spectrum of activities” analysis for the plain language of the statute can be seen in the kinds of activities held by the Ninth Circuit to constitute “tangible pecuniary benefits.” Those benefits include: lobbying for insurance and Medicare reform, the regulation of members’ advertising and solicitation, and providing continuing education. In addition, the court specifically included in its analysis of activities that could be counted as justifying Commission jurisdiction those that might “indirectly make members’ practices more efficient and reduce their costs.” *Id.* Thus, activities of an association that might benefit its members and also the public would give the Commission jurisdiction over a nonprofit entity.

In its law enforcement action against ACAM, the Commission has used the “pecuniary benefits” test to justify jurisdiction where the nature and substantiality of activities are truly at the far end of the spectrum, thereby demonstrating that this jurisdictional standard is being used as a means to regulate virtually any activity of any nonprofit association. After ACAM argued, during the course of the Commission’s investigation, that it was exempt from jurisdiction under Section 4, Commission staff requested additional information to determine whether ACAM had done anything to promote the financial interests of its members. ACAM was asked for information on its expenditures for a variety of activities, including its scientific conferences, the publication and distribution of its scholarly journal and other publications, responding to public inquiries, and appearances before state legislative bodies and medical boards.

Most of the activities for which the staff sought information from ACAM are among those cited in the Commission’s *AMA*

brief as educational and scientific “non-entrepreneurial” functions which, according to the Commission’s position before the Second Circuit, do not count toward determining jurisdiction under the “pecuniary benefits” test. Furthermore, the total dollar amount represented by all these activities constituted only two to three percent of ACAM’s budget; yet the staff still concluded that this was enough to trigger jurisdiction over ACAM. If two or three percent of a nonprofit organization’s budget is sufficient to justify jurisdiction, and if continuing professional education and the dissemination of professional publications that contain information with which the Commission does not agree count as business activities for purposes of Section 4, then the prediction Commissioner Elman made in his *Community Blood Bank* dissent has been realized: the Commission can exercise its authority over the sale of cookies at a church bazaar.

The enforcement policies reflected by the positions the Commission has taken in its actions against both CDA and ACAM simply cannot be reconciled with the plain language of Section 4. If the Commission and the courts continue to use the “pecuniary benefits” test, and if all the activities enumerated in the AMA and CDA cases – and those identified by Commission staff in its investigation of ACAM – can support Commission jurisdiction over nonprofit associations, then there is no longer any meaningful limit to that jurisdiction.

The Ninth Circuit’s adoption in this case of the “pecuniary benefits” analysis only confirms the wisdom of the *Community Blood Bank* test. While the Commission has long acknowledged that an association’s educational efforts should

remain outside the agency's jurisdiction,<sup>5/</sup> the Ninth Circuit now lists continuing education of the members as one of the apparent bases for Commission jurisdiction over the association. *CDA* at 726. Similarly, although an association's effort to preserve the integrity of the profession by the legitimate regulation of its members' advertising is a laudable nonprofit objective, the Ninth Circuit cites such activity as evidence of the commercial nature of the *CDA*. *Id.* Moreover, both the Ninth and Second Circuits regard the exercise of a Constitutional right to petition a government body (*i.e.*, lobbying for regulatory reform) as evidence that the nonprofit association has turned to the business of operating for the profit of its members. *CDA* at 726; *AMA* at 448. Thus, in two circuits, any association that enhances the state of the science it studies, preserves the ethics its members observe, improves the quality of the care they provide, or advises regulators of the benefits and costs of public policies thereby risks subjecting itself to the jurisdiction of the Federal Trade Commission. This is not the law in the Eighth Circuit. More importantly, this cannot be what Congress intended when it prohibited the Commission from asserting authority over nonprofit associations.

## II. FAILURE TO OBSERVE THE CONSTRAINTS OF SECTION 4 HAS ENCOURAGED THE COMMISSION TO BECOME A FEDERAL REGULATOR OF THE PRACTICE OF MEDICINE

After this Court divided on the Second Circuit's decision in *AMA*, the Association took its case to Congress and proposed

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<sup>5/</sup> See, e.g., the Commission's brief to the Second Circuit in *AMA*, *supra*.

legislation that would have diminished the FTC's authority by exempting state-licensed professionals from its jurisdiction altogether. Before Congress was the question whether the Commission was impermissibly intruding into the regulation of the services performed by professionals – so-called "quality of care" or "practice of medicine" issues traditionally regulated by the states. Responding to this jurisdictional threat, the FTC Chairman assured the Senate leadership that while the Commission had, over the years, examined certain practices of certain professionals and their organizations, the agency's activities did not

derive from any desire to regulate the professions. . . . Our objective, in both our competition and our consumer protection activities, is to enhance the ability of informed consumers to act as ultimate regulators of the market. . . . The Commission's activities in this area have not sought to interfere either with legitimate self-regulation or with the authority of the states to assure the quality of services to their citizens.

Letter from FTC Chairman James C. Miller, III to Honorable Bob Packwood, Chairman, Senate Comm. on Commerce, Science and Transportation and Honorable Bob Kasten, Chairman, Subcomm. on Consumer Protection (March 11, 1982).

A later letter from Chairman Miller to Senator Packwood confirmed that the FTC's interest in regulating professionals had historically extended only to "business practices" as

distinguished from quality of care issues or "scope" of practice. Letter from Chairman Miller to Honorable Bob Packwood (May 27, 1982). In characterizing the limitations on the Commission's regulation of professionals, Chairman Miller emphasized that the Commission's regulatory efforts are aimed only at "the illegal business practices of professionals" (Letter at 2, emphasis in original), not the regulated practices of members of nonprofit professional associations. In the wake of these representations, Congress declined to enact the AMA's proposed exemption.

Today, regulation of the quality of medical services to patients in the U.S. remains the responsibility of the states. This authority is typically exercised by state medical boards, whose primary responsibility is "to protect the public from the incompetent, unprofessional, improper, and unlawful practice of medicine, [and it] is determined by each state's medical practice act." Federation of State Medical Boards of the United States, Report of the Special Committee on Health Care Fraud at I-40 (April 1997). In 1995, the Federation of State Medical Boards of the United States, citing concern that recent legislative initiatives could restrict the ability of individual medical boards to regulate questionable health care practices, established a committee to develop recommendations to assist boards in "evaluating, investigating, and prosecuting physicians engaged in such practices." *Id.* The committee has reported its recommendations, and principal among them is the conclusion that collaboration between state medical boards and the FTC would be an effective way to "stop the spread of questionable health care practices." *Id.* at I-50. Specifically, the committee recommended that boards expand their liaison with the FTC in order to identify physicians who may be engaging in questionable health care practices (*id.* at I-42), use the FTC as

a source of information in their evaluation of such practices (*id.* at I-44), and coordinate with the FTC on avenues of potential prosecution against targeted physicians. *Id.* at I-46-47.

Prosecuting questionable health care practices or assisting state boards in their physician prosecutions is precisely contrary to the representations the Commission made to Congress during the AMA debates. Yet the Commission appears to have strayed in that direction in its zeal to thwart alternative medical treatments. A few months after the Commission opened its investigation of ACAM, an FTC representative addressed a meeting of the Federation of State Medical Boards. He advised the state board members that the Federal Trade Commission staff are beyond looking at claims, are sympathetic to problems the boards have had stopping certain medical practices, and are grateful to representatives of the boards for providing instruction to FTC staff on how to prosecute cases involving specific medical therapies. Matt Daynard, J.D., Remarks at the Annual Meeting of the Federation of State Medical Boards of the United States, 61-2 (April 11, 1996). This is just the kind of development that the AMA repeatedly predicted would occur if the professions were not exempt from Commission jurisdiction. If a Commission representative had come before the Federation of State Medical Boards in 1982, acknowledging the assistance of the boards in pursuing under the FTC Act cases the boards had been unable to successfully prosecute themselves, there is little doubt that the Commission would not have survived AMA's efforts to exempt professions from its jurisdiction.

There are other indications as well that the Commission is overstepping its jurisdictional boundaries by taking positions on the merits of certain medical therapies and communicating its

views directly to physicians. In the area of eye surgery, the Commission joined in the Food and Drug Administration's warning to doctors about appropriate standards that govern claims for medical procedures they might use. Letter on PRK promotion and advertising from Lillian J. Gill, Director, Office of Compliance, Center for Devices and Radiological Health, FDA and Dean C. Graybill, Associate Director, Division of Service Industry Practices, Bureau of Consumer Protection, FTC to Eye Care Professionals (May 7, 1996). In an advisory recently issued by the FTC on its website, the Commission also warns the public about the limitations of laser ocular surgery and invites consumers to contact the agency with questions or information concerning questionable practices. These activities cannot be meaningfully distinguished from the evaluation and regulation of medical procedures – the very area in which the FTC has repeatedly denied it has jurisdiction or regulatory interest. Of particular concern to ACAM is that if the agency intends to regulate medical practices, it can easily assert – under the amorphous “pecuniary benefits” standard – that its jurisdiction reaches associations that educate physicians or the public about those practices.

### III. THE *COMMUNITY BLOOD BANK* TEST IS A PROPER INTERPRETATION OF SECTION 4, BUT THE DISTINCTION BETWEEN PROFIT-MAKING ACTIVITIES AND NONPROFIT SERVICES SHOULD BE CLARIFIED

The *Community Blood Bank* test articulates a meaningful limitation on the Commission's jurisdiction that is true to the language of Section 4. Its adoption would place appropriate constraints on the Commission, while not resulting in a “blanket exclusion” from jurisdiction for nonprofit

associations.<sup>6/</sup> ACAM respectfully submits that applying that test, the Commission lacks jurisdiction over nonprofit professional associations such as CDA and ACAM.

Although the *Community Blood Bank* standard is true to the statutory language compared to the “pecuniary benefits” test, it still leaves open to some question the kinds of activities that might bring a nonprofit association within the jurisdiction of the Federal Trade Commission. The distinction between profit-making activities and nonprofit services is especially difficult to draw in the context of professional associations. If the Commission can declare, by using the term “pecuniary benefits,” that associations are generating profits for purposes of Section 4 when they provide continuing education to their members, then this federal agency can decide whether an association's instructors have properly substantiated and qualified their medical lectures. If the Commission can second-guess the decisions of an association that advises the public about therapies or regulates the expressed opinions of its members, then the agency can determine what the public learns about available care and how doctors communicate with their patients. If the Commission can assert jurisdiction over associations that educate regulators about the impact of public policies, then the agency can alter the course of state regulation of the professions.

These possible outcomes are problematic for associations of professionals, but the potential adverse effects on the public

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<sup>6/</sup> In its opposition to CDA's petition for a writ of *certiorari* the Commission suggests such a result (Opp. 13), but a “blanket exclusion” for nonprofit entities is not sought in the case now before the Court, nor would an adoption of the *Community Blood Bank* test establish one.

health could be far more significant. Fifteen years ago, the AMA voiced concerns such as these to Congress and the courts. What once may have seemed a remote threat to principles of federalism now must be seen as an imminent danger. Only by clarifying the Commission's jurisdiction over professional associations can this Court allay those concerns.

Pecuniary benefits are not a meaningful benchmark for distinguishing profit making from public service. Continuing medical education, maintaining ethical standards and regulating the quality of care should remain the concern of the states and the professions they regulate. Professional associations that facilitate these processes are providing public services, but are at the same time providing services that have real, if indirect, pecuniary value to their members. A better educated doctor or dentist may indeed be more efficient and therefore more profitable. A more ethical advertiser may be more valuable to society and, in the long run, more profitable for the practice of medicine. Efforts to inform public policy may redound to the pecuniary benefit of doctors and dentists, as well as their patients. Consequently, associations that advance these goals on behalf of their members may provide services that members would gladly pay for. Such associations, however, were not the concern of Congress in 1914, and they should not be the concern of the Commission today.

ACAM urges the Court to instruct the Commission to apply a clarified version of the test that *Community Blood Bank* announced when the Commission first sought judicial recognition of "pecuniary benefits" as a means to circumvent the intended limitations of Section 4. The conflict in the circuits has allowed the Commission to put nonprofit associations on a par with commercial public corporations.

Until the agency is ordered to follow a clarified version of *Community Blood Bank* there is every reason to believe it will continue to threaten prosecution of and bring cases that Congress never intended it to undertake.

### CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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